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# The Edmonton Encampment Litigation and The Charter Claims We Didn't (Get to) Argue

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Résumé de l'article

Ces dernières années, le nombre des sans-logis et des sans-abri au Canada a radicalement augmenté. Dans les centres urbains du Canada tout entier, les sans-abri se sont regroupés dans des campements par souci de sécurité et par sentiment de solidarité. La réaction des municipalités à la présence de ces campements consiste souvent à expulser leurs occupants. À l'automne 2023, la Coalition for Justice and Human Rights a présenté une demande pour le compte des résidents des campements d'Edmonton, alléguant que les politiques et les pratiques de déplacement des campements de la ville d'Edmonton violaient de façon injustifiable les droits et libertés que garantissent à ces personnes les articles 2, 7, 8, 12 et 15 de la Charte canadienne des droits et libertés. L'affaire a été invalidée pour un motif préliminaire, car la cour a décrété que la Coalition n'avait pas qualité pour agir dans l'intérêt public, et, de ce fait, elle ne s'est jamais prononcée sur le bien-fondé des allégations fondées sur la Charte de la Coalition. Cet article présente une chronologie procédurale de l'affaire des campements d'Edmonton et il énonce les arguments fondés sur la Charte que la Coalition prévoyait invoquer. Ce faisant, il vise à donner conseil à d'autres personnes ou entités engagées dans des litiges relatifs à de tels campements, de manière à élargir la conversation concernant la mise en cause de la Charte dans la présence des campements et les réponses gouvernementales à ceux-ci, ainsi qu'à donner la parole aux sans-abri qui ont témoigné à l'appui de la poursuite de la Coalition.

# The Edmonton Encampment Litigation and The *Charter* Claims We Didn't (Get to) Argue

**Anna Lund***

*In recent years, the number of unhoused and unsheltered individuals in Canada has risen dramatically. In urban centres across Canada, unsheltered individuals have gathered together in encampments for safety and a sense of community. Municipalities frequently respond to these encampments by forcibly evicting them. In autumn 2023, the Coalition for Justice and Human Rights filed a claim on behalf of Edmonton's encampment residents, alleging their rights and freedoms, as enshrined in the Canadian Charter of Rights and Freedoms sections 2, 7, 8, 12, and 15, were unjustifiably infringed by the City of Edmonton''s encampment displacement policies and practices. The case was struck on a preliminary ground, because the court held that the Coalition lacked public interest standing, and thus the court never made a decision on the merits of the Coalition's Charter claims. This article provides a procedural chronology of the Edmonton encampment case and sets out the Charter arguments that the Coalition planned to advance. In doing so, this article aims to offer guidance to others engaged in encampment litigation, to broaden the conversation about how the Charter is implicated in encampments and governmental responses to them, and to give voice to the unhoused individuals, who provided evidence in support of the Coalition's lawsuit.*

*Ces dernières années, le nombre des sans-logis et des sans-abri au Canada a radicalement augmenté. Dans les centres urbains du Canada tout entier, les sans-abri se sont regroupés dans des campements par souci de sécurité et par sentiment de solidarité. La réaction des municipalités à la présence de ces campements consiste souvent à expulser leurs occupants. À l'automne 2023, la Coalition for Justice and Human Rights a présenté une demande pour le compte des résidents des campements d'Edmonton, alléguant que les politiques et les pratiques de déplacement des campements de la ville d'Edmonton violaient de façon injustifiable les droits et libertés que garantissent à ces personnes les articles 2, 7, 8, 12 et 15 de la Charte canadienne des droits et libertés. L'affaire a été invalidée pour un motif préliminaire, car la cour a décrété que la Coalition n'avait pas qualité pour agir dans l'intérêt public, et, de ce fait, elle ne s'est jamais prononcée sur le bien-fondé des allégations fondées sur la Charte de la Coalition. Cet article présente une chronologie procédurale de l'affaire des campements d'Edmonton et il énonce les arguments fondés sur la Charte que la Coalition prévoyait invoquer. Ce faisant, il vise à donner conseil à d'autres personnes ou entités engagées dans des litiges relatifs à de tels campements, de manière à élargir la conversation concernant la mise en cause de la Charte dans la présence des campements et les réponses gouvernementales à ceux-ci, ainsi qu'à donner la parole aux sans-abri qui ont témoigné à l'appui de la poursuite de la Coalition.*

## I. CLAIMING SPACE (AN INTRODUCTION)

A growing number of Canadians do not have permanent, stable housing. A substantial portion of these unhoused people are unsheltered, meaning they are "living on the streets or in places not intended for human habitation."[1] In urban areas, unsheltered persons will sometimes live together in encampments. Encampments have become a controversial political issue and the subject of litigation. In Canada, encampment litigation asks courts to grapple with what protection the *Charter of Rights and Freedoms* offers to unsheltered people who are living in encampments.

In the autumn of 2023, a non-profit organization in Edmonton, the Coalition for Justice and Human Rights, sued the City of Edmonton over its encampment displacement policies and practices. As part of its legal strategy, the Coalition applied for an interlocutory injunction to restrain *when* and *how* encampments could be displaced. The parties developed a significant evidentiary record in advance of the injunction application. However, the Alberta Court of King's Bench struck the lawsuit in January 2024, on the basis that the Coalition did not have public interest standing to pursue its claims.[2] Thus, the parties never had the opportunity to present their arguments on the injunction to the court. This article provides a procedural chronology of the Edmonton encampment case and sets out the *Charter* arguments that the Coalition planned to advance as part of its injunction application. The aims of this article are three-fold.

First, for lawyers and litigants involved in encampment litigation elsewhere in Canada, this article may provide substantive guidance on how to frame their *Charter* claims and help them to identify procedural obstacles that they might encounter when advancing those claims.

Second, this article aims to broaden the conversation about how the *Charter* is implicated in encampments and governmental responses to them. Most court decisions in this area focus on how governmental responses violate the rights of unsheltered people to life, liberty and security of person, as enshrined in section 7. A few have engaged in a section 15 analysis, considering the discriminatory impacts of governmental responses.[3] In the Edmonton litigation, the evidence the legal team collected from unhoused people led the Coalition to advance additional *Charter* claims.

The Coalition's *Charter* claims were framed to reflect what unsheltered people said about the benefits of living in encampments and the harms of displacement. They spoke of the benefits of living in encampment communities with other unhoused people, so the Coalition raised claims about how encampment displacements violated the freedoms of association and peaceful assembly of unhoused people (section 2). They spoke of the devastating consequences that flowed from the loss and seizure of personal property that occurs during displacements, so the Coalition raised claims about unlawful search and seizure (section 8). They spoke of how displacements undermined their dignity and denied their

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* Professor, University of Alberta. This article builds on the intellectual contributions that the other legal team members (Chris Wiebe, Avnish Nanda, Devyn Ens and DJ Janjua), the unhoused affiants, the experts and the client representatives (Sam Mason and Renée Vaugeois) made while putting together the legal case against the City of Edmonton. Thanks to Jessica Csandl and Sarah Rhydderch for assistance with research and editing and to Martha Jackman, Kerri Froc, Gerard Kennedy, Chris Wiebe, and Renée Vaugeois for reading and providing feedback on earlier drafts of this article.

1 Stephen Gaetz et al, *Canadian Definition of Homelessness* (Toronto: Canadian Observatory on Homelessness Press, 2012) at 1.

2 *Coalition for Justice and Human Rights Ltd v Edmonton* (*City*)*,* 2024 ABKB 26 [*Coalition for Justice and Human Rights,* Standing Decision].

3 *Black et al v City of Toronto*, 2020 ONSC 6398 (CanLII) at paras 60-62 [*Black*].

human worth, so the Coalition argued that displacements are cruel and unusual treatment (section 12). Finally, many of the unhoused people that the Coalition's lawyers spoke with were Indigenous. They spoke about the indignity of being displaced, yet again, from their traditional lands. The Coalition considered advancing a section 35 Aboriginal rights claim but foresaw challenges around who is able to advance such a claim.[4] It instead framed its section 15 claim (non-discrimination) to reflect this aspect of the evidentiary record.

The third, and final aim of this article is to give voice to the unhoused individuals who provided evidence in support of the Coalition's lawsuit. Sharing their accounts came with risks. The experiences they described were often traumatic, and it was painful to revisit them. They feared reprisals from police or service providers for speaking out about their experiences. Yet, they persisted in the hope that sharing their experiences might change how the City handles encampments. Ten provided affidavit evidence, five underwent questioning by City and Police lawyers on their affidavits. The Court's decision about standing silenced these witnesses because it forestalled their evidence from being presented as part of the Coalition's injunction application. This article aims to amplify their descriptions of life in encampments and the harms of displacement.

Amplifying the accounts of unhoused people is important work because what happened in the Coalition's case reflects a bigger trend in the Canadian poverty law field. Litigants advancing poverty-related *Charter* claims face overlapping barriers that regularly prevent them from having their matters heard in court. There is seldom money to fund their legal matters: those experiencing poverty do not have it and government funded programs, such as legal aid and the Court Challenges Program, rarely apply.[5] The Coalition's lawsuit was only able to proceed because the legal team worked for free. Poverty lawsuits that get off the ground face "procedural maneuvers" by government lawyers "that can render litigation unaffordable" or, like in this case, that entirely preclude the matter from being heard.[6] Government defendants challenging the justiciability of the claim or the standing of the plaintiff are two such procedural maneuvers.[7] The result is that poverty law cases often are not decided on their merits, with the unenviable result that governments receive no substantive guidance on how to ensure their laws and practices safeguard the basic rights of the people living in poverty. Having been denied adjudicative space in the legal system, this article claims space of a different kind to advance the *Charter* rights of encampment residents.[8]

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4 *Behn v Moulton Contracting Ltd,* 2013 SCC 26 at para 30.

5 There is no test case fund under Alberta's Legal Aid Regime; there is such a fund in Ontario, see Legal Aid Ontario, "Test Case Funding" online: <www.legalaid.on.ca/lawyers-legal-professionals/test-cases/>. The Court Challenges Program funds court challenges involving human rights, but only if they include a challenge to a federal law, policy, or practice, see Court Challenges Program, "Eligibility Criteria - Litigation" (2018), online: <pcj-ccp.ca/rights-human-rights/litigation-human-rights-rights/>; and see Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) 355 at 358-59.

6 Brodsky, *ibid* at 366.

7 Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Young et al, *supra* note 5, 77 at 80.

8 *Ibid*.

## II. ON SCHOLARSHIP AND ADVOCACY (AN ETHICAL INTERLUDE)

Before embarking on the procedural overview, I want to reflect for a moment on my own position as the author of this article and the ethical choices I have made in writing it. I do not come to this topic as a passive observer, offering commentary from a distance. I was part of the legal team that advised the Coalition. I am also an academic. Each of these roles comes with specific ethical constraints.

As a lawyer, I owe duties to my client, the Coalition. I owe them a duty of confidentiality.[9] Most of the information contained in this article is in the public record, including in court documents and media reports. Some of the information draws on my own knowledge of how the lawsuit unfolded. I have shared a draft of this article with the Coalition prior to publication, to ensure that I have not made any unauthorized disclosures. I also owe them a duty to represent them "resolutely and honourably within the limits of the law."[10] To that end, it bears repeating that this article advances the arguments we would have made about how the City's displacement activities breach the *Charter* rights of unhoused people. Since the litigation ended, I have taken time to further develop the legal analysis, to connect our argument to relevant academic literature, and to workshop the arguments with other scholars.[11] But these arguments are undoubtedly shaped by the role I played in the litigation as an advocate. I do not pretend otherwise.

As a lawyer I also owe duties to uphold the administration of justice, which includes restrictions on when and how I criticize court decisions. In particular, the guidance offered to Alberta lawyers in our *Code of Conduct* directs that "if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective."[12] I have opted not to provide any commentary of the two decisions rendered by the court in the Coalition's lawsuit and instead have focused on the arguments that the Coalition did not have the opportunity to make.

As an academic, I am bound to carry out research ethically and am guided in that process by the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans. [13] Research which relies, as this one does, on court documents is considered exempt from the research ethics approval process under the Tri Council Policy.[14] The Policy Statement also emphasizes the researcher's duty of confidentiality. In light of this obligation, I have opted to redact identifying information, despite it being readily available in the court records. Each affidavit names the person who has sworn it. I have opted to refer to all affiants by their initials. Encampments are deeply divisive, and I would not want anyone to be targeted or stigmatized as a result of this article. There are two categorical exceptions to this practice of redaction.

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9 Law Society of Alberta, *Code of Conduct* (30 November 2023) R 3.31-3.32, online: <documents.lawsociety.ab.ca/wp-content/uploads/2017/01/14211909/Code.pdf > ["*Code of Conduct*"].

10 *Ibid* at R 5.1-1.

11 I workshopped this piece on 31 May 2024 at the Annual Meeting of the Canadian Association of Law Teachers in Fredericton, NB and at an internal Faculty and student workshop at the University of Alberta, Faculty of Law on 3 June 2024, generously organized by Jessica Eisen. It has benefitted greatly from the constructive feedback I received in both forums.

12 *Code of Conduct, supra* note 9 at R 5.6-1, Commentary [3].

13 Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, & Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, Catalogue No RR4-2/2023E (Ottawa: Secretariat on Responsible Research, December 2022), online: <ethics.gc.ca/eng/documents/tcps2-2022-en.pdf> [*Tri-Council Policy Statement*].

14 *Ibid* at article 2.2(a).

Where a person provided affidavit evidence based on their subject matter expertise, I believe it is important to name them in my footnotes, so as to recognize their intellectual contributions to this lawsuit. Likewise, I have named the members of the Coalition who were involved in this lawsuit to recognize their contributions to this case.

A person operating in dual roles – each subject to a different set of ethical constraints – risks role confusion.[15] For me, the risk of role confusion was mitigated by the fact that I did not foresee writing this article while the case was ongoing. Up until the court made its standing decision, I saw myself as a lawyer and not an academic. The possibility of this article occurred to me in the aftermath of the case being struck, as a way of contributing to the advancement of our understanding of how the *Charter* is implicated in encampment cases. This chronological separation made it easier for me to navigate between my two roles.

There is a healthy and ongoing debate over whether scholars step outside their role when they pursue specific legal or political outcomes.[16] My own view is none of us are neutral in the scholarship we do, ever. Scholarship is never undertaken "in a hermetically sealed value free-domain."[17] To hold otherwise evidences "an uncomplicated reliance on concepts of neutrality and objectivity, as well as the dichotomy of activism and scholarship, which seems to replicate gendered binaries endlessly critiqued and ultimately deconstructed by feminists…"[18] And yet, I take seriously the idea that as a scholar I need to be reflective about my position, and approach my work with "self-awareness, humility and independence."[19] At the same time, my role as academic engaged in advocacy can offer an insider perspective that those working at a distance cannot easily – or maybe ever – access. In this piece, my insider perspective is particularly valuable in explaining procedurally what happened in this lawsuit.

My ethical obligations as a lawyer and an academic both constrain and compel me. In this case, they have compelled me to write this article. Unhoused people face barriers, often insurmountable ones, to vindicating their rights through the courts. And yet they have firsthand expertise of the benefits and harms of encampments. In the tradition of community lawyering, the Coalition's legal team aimed to develop "a fuller understanding of [encampment displacements] and the context in which [they] arise" by interviewing unhoused people, listening carefully to their stories, and then crafting legal arguments that reflected those stories.[20] This article creates space for their contributions to inform and improve our understanding of how the *Charter* is implicated in their lives. As a lawyer, I have obligations to facilitate

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15 Nancy D Polifoff, "Am I My Client?: The Role Confusion of a Lawyer Activist" (1996) 31:2 Harv CR-CL L Rev 443.

16 See Tarunabh Khaitan, "Editorial: On Scholactivism in Constitutional Studies: Skeptical Thoughts" (2022) 20:1 ICON 547; Thomas Bustamante "Reflecting on the Ethical Commitments of Our Role" (2022) 20:2 ICON 557.

17 Liora Lazarus, "Constitutional Scholars and Scholactivism" (2022) 20:2 ICON 559 at 560.

18 Kerri Froc, "How Should a Person Be (in Academia)? Engaging with the World's Disparities through Scholarly Activism" (Paper delivered at the Law as a Terrain for Advancing Social Justice: Symposium on the Occasion of Martha Jackman's Retirement, Faculty of Law, University of Ottawa, 23 May 2024) [unpublished].

19 Adrienne Stone, "A Defence of Scholarly Activism" (2023) 31 Const'l Court Rev 1 at 12.

20 Shauna I Marshall, "Mission Impossible: Ethical Community Lawyering" (2000) 7:1 Clinical L Rev 147 at 160; see also Christine Zuni Cruz, "[On the] Road Back In: Community Lawyering in Indigenous Communities" (1999) 24:1 Am Indian L Rev 229.

access to justice[21] and to seek improvements in the legal system.[22] As an academic, a core ethical principle guiding my research is justice.[23] It is with these obligations in mind that I have written this article.

## III. A PROCEDURAL OVERVIEW OF THE EDMONTON ENCAMPMENT CASE

The Edmonton encampment litigation was preceded by significant growth in the City's homeless population. In 2020 there were 1651 unhoused people, this figure grew to 3137 in August 2023.[24] The growth was attributable to a confluence of factors: the COVID-19 pandemic, the toxic drug crisis and a crisis of housing affordability.[25] Encampments became commonplace in and around the downtown core, as well as throughout the river valley and ravine park system.[26] When members of the public complained about an encampment, the City of Edmonton and the Edmonton Police would investigate, assess the encampment, and displace it based on its perceived riskiness. The number of public complaints about encampments spiked alongside the size of the homeless population: from 6,695 in 2021 to 13,683 in the first ten months of 2023.[27] Displacements became more common too: 1880 camps were closed in 2022 and that number grew to 2099 in the first 10 months of 2023.[28]

Displacements are hard on encampment residents. Stories about the harms of displacements started to reach Chris Wiebe. Chris is a lawyer in Edmonton, but prior to law school, he worked with unhoused people in central Edmonton and he has maintained close ties with people working in the sector. He was hearing from his friends that they had serious concerns with how the City was displacing unhoused people from encampments. Yet, when Chris suggested litigation, he repeatedly met resistance to the idea because people were worried that their organizations might face reprisals for challenging the City in court.

Chris eventually connected with a willing plaintiff: the Coalition for Justice and Human Rights. The Coalition had been set up to hold governments accountable.[29] Its founding members worked at non-profits in the Edmonton area and found that they were limited in the types of advocacy that they could do through their organizations. So, they established the Coalition. The Coalition allowed them to address issues that went beyond the specific mandates of their home organizations. For example, a person working with an organization that served prison-involved people might see many of the people they serve ending up

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21 *Code of Conduct, supra* note 9 at R 3.4-15, Commentary [1]. Arguing that lawyers have an ethical obligation to advance substantive equality, see Daniel Del Gobbo, "Legal Ethics and the Promotion of Substantive Equality" (2022) 100:3 Can Bar Rev 439.

22 *Ibid* at R 5.6-1, Commentary [4].

23 *Tri-Council Policy Statement, supra* note 13 at article 1.1.

24 *Coalition for Justice and Human Rights*, Action Number 2303 15571(Affidavit of Damian Collins, affirmed 29 August 2023) at paras 22-23 ["Affidavit of Damian Collins #1"].

25 *Ibid* at paras 12, 23. On contributing factors to the growing number of encampments nationwide see Office of the Federal Housing Advocate, *Upholding Dignity and Human rights; The Federal Housing Advocate's Review of Homeless Encampments – Final Report* (Ottawa: Canadian Human Rights Commission, 2024) at 6 ["*Upholding Dignity"*].

26 *Coalition for Justice and Human Rights*, Action Number 2303 15571(Affidavit of TC, sworn 8 November 2023) at Exhibit D (maps of encampment locations are contained in this affidavit) [Affidavit of TC].

27 *Ibid* at para 6.

28 *Ibid* at para 8.

29 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Affidavit of Sam Mason, affirmed 25 August 2023) at para 4 [Affidavit of Sam Mason] (One of the objects of the Coalition was "to use the tools of human rights to demand accountability from all levels of government.")

unhoused, yet advocating on homelessness fell outside of the scope of their organization's mandate. In their home organizations, they might also face barriers to challenging government behavior, because the organizations relied on government for funding and worried about having their funding withdrawn if they challenged the government's activities. The Coalition had "by design" opted not to seek government funding, "because if [they]'re holding different levels of government accountable, receiving money from them makes that very difficult."[30]

A team coalesced around Chris and the Coalition. Chris recruited Avnish Nanda as co-counsel. Avnish has built a public interest law practice in Edmonton and has experience litigating constitutional claims against the Provincial Government. DJ Janjua and I assisted with litigation strategy and legal research and writing. Devyn Ens, a paralegal who works with Avnish, played a significant role in the legal team's work. Shayla Breen provided invaluable communications support.

The groundwork for the litigation started in the summer of 2023. Chris visited encampments with Coalition member, Judith Gale. Judith had been involved in mutual aid outreach to unhoused people living in Edmonton since 2020, most recently through a group called the Bear Claw Patrol Beaver Hills House.[31] Chris and Judith spoke with encampment residents about how displacements impacted them. These conversations informed how the Coalition framed its constitutional claims. Additionally, Chris asked encampment residents if they would be willing to provide evidence in support of the Coalition's *Charter* challenge. Ten did.

Involving Judith Gale in collecting evidence was vital. Many people living in encampments have had negative experiences with the legal system and are skeptical of lawyers. Judith would later provide evidence of how her pre-existing relationships with unhoused people made some more willing to provide evidence:

> Because many of the people staying in encampments already knew and trusted me, I observed and believe that they were more willing to speak with and trust Mr. Wiebe. Some of the people staying in encampments were even willing to solemnly affirm affidavits with Mr. Wiebe; however, some were not because they were afraid of legal consequences or reprisal from law enforcement. Without my being there to introduce Mr. Wiebe, I believe fewer of the affiants would have been willing to talk to and trust a member of the legal system like Mr. Wiebe.[32]

In addition to collecting evidence from directly impacted people, Chris used Alberta's freedom of information process to request information from the City and the Edmonton Police Service about how and when they were carrying out encampment displacements.

On 28 August 2023, the Coalition for Justice and Human Rights filed a Statement of Claim against the City of Edmonton, alleging that its encampment displacement policy violated the *Charter* freedoms and

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30 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning of Sam Mason, 11 October 2023) at 34, lines 1-5 [Transcript of Sam Mason].

31 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Affidavit of Judith Gale, affirmed 23 November 2024) at paras 4-11 [Affidavit of Judith Gale].

32 *Ibid* at para 16.

rights of unhoused Edmontonians.[33] The next day, the Coalition applied for an interlocutory injunction, to restrict *when* and *how* the City of Edmonton displaced encampments pending a decision on the underlying *Charter* claims.[34]

As a preliminary matter, the City asked the Court to strike the Coalition's claim on the basis that it lacked public interest standing.[35] A litigant is a *public interest standing* litigant when it seeks to advance a claim on behalf of a directly impacted person.[36] Often *Charter* claims are advanced by people who are directly impacted by government conduct, these litigants have private standing. The Coalition, however, was not directly impacted by displacements. Rather, it was advancing its claims *on behalf* of encampment residents who were experiencing displacements. Courts play a supervisory role, to ensure that public interest standing litigants are appropriate parties to advance their claims. The Court will evaluate if the issue raised by the litigant is serious and justiciable, if the litigant has "a real stake or genuine interest in its outcome", and if the lawsuit is "a reasonable and effective means to bring the case to court."[37] The Coalition believed that it was an appropriate public interest standing litigant because a myriad of barriers made it infeasible for unsheltered people to pursue *Charter* litigation and because other organizations operating in the housing sector were unwilling to litigate.

The City raised five additional preliminary issues. The City asked the Court to strike some of the claims and remedies sought by the Coalition, as well as some of the evidence that it was relying upon. It took the position that a litigant with public interest standing cannot claim any remedies under section 24(1) of the *Charter*.[38] Additionally, it sought to strike the Coalition's claims regarding the seizure and disposal of property belonging to unhoused individuals during displacements; the City argued that the Coalition had not pled sufficient facts to support these claims.[39] It argued that two of the Coalition's experts should be excluded for bias because they had engaged in advocacy on behalf of unhoused people and in favour of the right to housing.[40] It argued that the evidence of unhoused affiants should be struck if they could not be produced for questioning. Later, the City applied to strike the Coalition's reply affidavits arguing that they included material which the Coalition should have introduced at the outset of the case.

The Coalition agreed to the City's request that it not be required to file a Statement of Defence until after the preliminary issues and the interlocutory injunction were decided.

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33 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Statement of Claim, filed 28 August 2023) [Statement of Claim].

34 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Application, filed 29 August 2023).

35 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Notice of Application by the City of Edmonton, filed 27 October 2023) at paras 1, 7-9. [Preliminary Notice of Application].

36 Or, when there is no directly impacted person, see *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 SCR 138.

37 The test for public interest standing is set out in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 2.

38 Preliminary Notice of Application, *supra* note 35 at paras 3, 10-11 (the Application cited section 24(2) of the *Charter,* but the City's written arguments clarified that their position was that remedies under section 24(1) were unavailable to a public interest standing litigant). But see *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2019 BCCA 228 (CanLII), at paras 240-254, leave to appeal granted 2020 CanLII 10501 (SCC)(the Supreme Court of Canada granted leave on this question, however, the underlying litigation was resolved and the matter was not heard).

39 Preliminary Notice of Application, *supra* note 35 at paras 2, 11.

40 *Ibid* at paras 4(a),(b), 12-14.

The evidentiary record for the injunction was sizeable. In support of its injunction application, the Coalition filed 10 affidavits from individuals with lived experience of encampment displacements, 5 expert affidavits, as well as affidavits from people involved with the Coalition and one from a paralegal attaching the responses from Chris' freedom of information requests. The City responded by filing 18 affidavits. The City's evidence included affidavits from City employees involved in housing, park operations, fire safety and rescue, and the Clerk of the City. The City tendered expert evidence from a public health doctor and a safety specialist. Both sides submitted evidence from people who lived or operated businesses in the central Edmonton neighbourhoods where encampments are commonly found. On the interlocutory injunction application, there were over 3700 pages of affidavit evidence.

The Coalition did not name the Edmonton Police Service as a defendant in its lawsuit, as the focus of its challenge was the City's policy framework for encampment displacements. However, the Police applied for intervener status. They were concerned about allegations made in the Coalition's evidence regarding officer misconduct during encampment displacements and worried about reputational harms to the Police.[41] The Police provided affidavit evidence from one officer involved in encampment displacements.[42]

In the four months after the Statement of Claim was filed, the parties questioned each other's affiants. The lawyers spent over 40 hours in questioning and the resulting transcripts amounted to over 1100 pages as well as hundreds of pages of responses to undertakings.[43] Some witnesses were questioned at the lawyers' offices or remotely. For the unhoused affiants, the Coalition made different arrangements. A group of outreach workers from a social agency, mutual aid volunteers and Judith Gale helped Chris locate the unhoused affiants.[44] Two were questioned at a social agency located in the downtown core.[45] Three were questioned remotely from the encampments where they were sheltering: Chris and Avnish sat with these affiants and ran the questioning off Chris' laptop.[46] On two days when questioning had been scheduled, Chris arrived at the encampments where the affiants were believed to be living, only to find that City was in the process of displacing them. Five of the ten affiants with lived experience underwent questioning. Five could not be located. One later indicated that he did not wish to undergo questioning because the process caused him a great deal of fear.[47]

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41 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Application for Intervener Status, filed 15 September 2023) ("The Chief and EPS have an interest in ensuring that the actions of EPS officers are properly represented in full context. Ensuring that police actions are accurately depicted before this Honourable Court is important to maintaining public confidence in the police and the administration of justice." at para 3.)

42 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Affidavit of MD, sworn 10 November 2023) [Affidavit of MD].

43 Calculations on file with author.

44 Staff from the Bissell Centre and volunteers from Tawâw Outreach assisted Chris.

45 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning RC, 27 September 2023) [Transcript of RC]; *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning of JB, 27 September 2023) [Transcript of JB].

46 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning RNSY, 27 September 2023) [Transcript of RNSY]; *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning LR, 28 September 2023) [Transcript of LR]; *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning of LW, 28 September) [Transcript of LW].

47 Affidavit of Judith Gale, *supra* note 31 at para 17.

Transcripts from the questioning were filed in court and, along with the affidavits and responses to undertakings, comprised the evidentiary record upon which the Court would make its decision about the interlocutory injunction. Almost all of these records are covered by the open court principle, and available to the public. The only exception, which is not publicly available, is one affidavit from a police officer that was sealed by an order of the court.[48]

The Coalition wanted to have the injunction heard in November or December, so that additional safeguards would be put in place to protect unsheltered Edmontonians before the coldest part of the winter arrived. The City of Edmonton felt that it would not have sufficient time to prepare the evidentiary record and asked for a later hearing date. The Court scheduled the matter to be heard over two days in early 2024, January 10 and 11. The preliminary matters were to be heard on January 10 and the injunction on January 11.

On Thursday, December 14, 2023, the Coalition was alerted by someone working with unhoused people that the Edmonton Police and City of Edmonton were coordinating to carry out significant encampment displacement activities targeting eight encampments. The President of the Coalition, Sam Mason, along with Avnish and Devyn, went out that evening to talk to people living in the encampments that were targeted for displacement. The next morning, a Friday, the Coalition brought an emergency application for an interim injunction, to stop the planned displacements. The Court heard from the Coalition, the City and the Edmonton Police Service, but then adjourned the matter over the weekend, to allow the Edmonton Police Service to provide affidavit evidence regarding why the displacements of these encampments was urgent.

A busy weekend ensued. The Coalition collected affidavits from three social agencies in Edmonton, Bissell, Boyle and YESS, each setting out their concerns with the proposed encampment displacements. The Police provided the Coalition with their affidavit on Sunday afternoon and Avnish questioned the affiant three hours later.[49]

When the hearing resumed on Monday December 18, 2023, the Court strongly encouraged the City, the Edmonton Police, and the Coalition to agree to the terms of an interim injunction, setting out *when* and *how* the eight encampments could be displaced. The parties went back and forth, and eventually agreed to an order that imposed the following conditions on any encampment removals:

- That the City confirm whether adequate shelter space is available before removing an encampment. If adequate shelter space is not available, a removal can only occur where the encampment poses an imminent health or safety risk,
- That the City consider "the weather, and the potential harms associated with encampment closure during cold weather especially, when exercising its discretion to close an encampment,"
- That the City provide notice of a planned displacement to encampment residents at least 48 hours before closing it, and

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48 This affidavit was filed as part of the interim injunction proceedings in December 2023.

49 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning of MD, 17 December 2023).

- That the City provide prior notice of a planned displacement to social agencies who support unhoused people in Edmonton.[50]

In the days after the Court granted the interim injunction, the City of Edmonton took two steps, seemingly in response to the litigation. First, it passed a motion declaring a housing and homelessness emergency in Edmonton.[51] Second, it incorporated some of the terms from the interim injunction into its encampment displacement framework.[52] These changes only applied to encampments that were deemed to be high risk *and* that comprised more than 20 structures. When the City sought to close such encampments they had to ensure that there was adequate indoor shelter space, seek approval from the Deputy City Manager, and provide notice of the planned displacement to social service agencies, encampment residents, as well as to City Council.

The City and the Police would displace all eight encampments covered by the interim injunction. The first displacement occurred on December 29, 2023.[53] The last of the eight encampments was displaced while the Coalition's lawyers were arguing the preliminary issues in court on January 10, 2024.

The Coalition had concerns that the City and the Police were displacing the eight encampments in violation of the interim injunction order. In particular, the Coalition believed that the City was displacing encampments without ensuring that there was adequate indoor shelter space available.[54] On January 9, 2024, Avnish appeared in court to ask that the City and the Police be held in contempt. The Court

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50 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Order granted by Justice Davidson, 18 December 2023).

51 City of Edmonton, "Special City Council – Minutes" (15 January 2024) at 8, online (pdf): <pub-edmonton.escribemeetings.com/FileStream.ashx?DocumentId=209735>.

52 City of Edmonton, "How the City and Its Partners Respond to Encampments on Public Land", online (pdf): <www.edmonton.ca/sites/default/files/public-files/EncampmentResponseFlowCharts.pdf?cb=1704485031>. Noting that these changes were communicated to the Coalition's counsel on January 3, 2024, see Lauren Boothby, "Edmonton quietly changes tactics for large homeless encampments ahead of court challenge", *Edmonton Journal* (5 January 2024), online: <https://edmontonjournal.com/news/local-news/edmonton-quietly-changes-tactics-for-large-homeless-encampments-ahead-of-court-challenge>.

53 City of Edmonton, News Release, "High-risk encampment closed in adherence to interim Court Order" (29 December 2023), online: <http://conta.cc/3TLO2fV>; City of Edmonton, News Release "Another high-risk encampment closed in adherence to interim Court Order" (30 December 2023), online: <http://conta.cc/4awup1k>; City of Edmonton, News Release "High-risk encampment in Dawson Ravine closed in adherence to interim Court Order" (2 January 2024), online: <http://conta.cc/3viUReW>; City of Edmonton, News Release, "Fourth High-risk encampment closed in adherence to interim Court Order" (3 January 2024), online: <http://conta.cc/48ILIuz>; City of Edmonton, News Release, "Fifth High-risk encampment closed in adherence to interim Court Order" (5 January 2024), online: <http://conta.cc/4aMZgHi>; City of Edmonton, News Release, "Sixth high-risk encampment closed in adherence to interim Court Order" (6 January 2024), online: <http://conta.cc/41OlwMI>; City of Edmonton, News Release, "Seventh high-risk encampment closed in adherence to interim Court Order" (7 January 2024), online: <http://conta.cc/3TPprH2>; City of Edmonton, News Release, "Closure of eighth high-risk encampment proceeds; court deliberations about future response activity continue" (10 January 2024), online: <http://conta.cc/48uumBF>.

54 Wallis Snowdon & Natasha Riebe, "Edmonton Homeless encampment residents resist eviction as advocacy group loses bid to stall removals", *CBC* (9 January 2024), online: <www.cbc.ca/news/canada/edmonton/court-challenges-homeless-encampments-edmonton-1.7078387#:~:text=The%20advocacy%20group%20alleged%20the,Bench%20Justice%20Kent%20Davidson%20Tuesday>.

determined that it did not have a sufficient evidentiary record upon which to decide the matter. It indicated that further relief could be granted as part of the interlocutory injunction hearing and that the question of contempt should be adjourned to a future date, when both parties could present further evidence.

On the morning of January 10, the Justice assigned to hear the interlocutory injunction advised the parties that he would require two days to hear arguments on the City's preliminary applications challenging the Coalition's standing, claims, remedies, and evidence. The Justice indicated that he would provide a decision on the preliminary issues on January 16, and if that decision did not dispose of the matter, the parties would be expected to argue the interlocutory injunction that day. Counsel proceeded as directed. They argued the preliminary issues on January 10 and 11, 2024. When the parties returned on January 16, 2024, they were provided with the Court's decision, striking the Coalition's claim on the basis that it was not an appropriate litigant to be granted public interest standing.[55] The Court accepted that it was infeasible for unhoused people to bring *Charter* litigation, but indicated that organizations with more of an "established history of working with the unhoused population" should be entrusted with bringing forward the litigation, or choosing not to.[56]

The day after the Coalition's lawsuit was struck, the Province of Alberta and the Edmonton Police Service held a joint press conference, announcing that they would be adopting a new approach to encampment removals. The new approach included establishing an Emergency Operations Centre to oversee the displacements,[57] and a Navigation Centre, which would help connect displaced residents with relevant services.[58]

The Coalition considered whether to appeal the decision on standing, but ultimately decided not to. It would have taken months for the appeal to be heard and the outcome was uncertain. Even if the Coalition won, they needed to rebuild the evidentiary record because the encampment removal framework had changed significantly the day after the initial standing decision. The Coalition determined that its efforts were better expended elsewhere.

That just left the matter of costs. In civil litigation, the default rule is that the loser should pay some of the winner's costs. However, courts have adopted a different approach to costs in constitutional and public interest litigation. When government defendants succeed, courts regularly require each party to bear their own costs, and in rare cases, will even require the winning government defendant to pay some of the losing plaintiff's costs.[59] The justification for this departure from the default rule of loser pays is that "the unsuccessful party has made a contribution to the public weal by litigating an important constitutional point (albeit unsuccessfully)."[60]

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55 *Coalition for Justice and Human Rights,* Standing Decision, *supra* note 2.

56 *Ibid* at paras 61-70.

57 Edmonton City Council, "Emergency Advisory Committee - Agenda" (23 January 2024) at 57, online (pdf): <https://pub-edmonton.escribemeetings.com/FileStream.ashx?DocumentId=209788.>.

58 Government of Alberta, "New supports for vulnerable people in Edmonton" (17 January 2024), online: *Government of Alberta*: <www.alberta.ca/release.cfm?xID=89607F3B46402-056A-DAC8-C03E7B7CCA7DC656>.

59 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed at § 59:14 (WL), citing *B (R) v Children's Aid Society,* [1995] 1 SCR 315 as an example of a rare case where a losing plaintiff was awarded costs. Leading and recent Alberta cases considering costs in the public interest context include *Prodaniuk v Calgary (City),* 2022 ABQB 568; *Pauli v ACE INA Insurance Co,* 2004 ABCA 253; *Elder Advocates of Alberta Society v Alberta Health Services*, 2021 ABCA 67.

60 Hogg & Wright, *supra* note 59 at § 59:14.

The City sought partial indemnity costs against the Coalition, in the amount of $25,000.[61] The matter was heard on March 7, 2024. On March 14, 2024, the Court released written reasons in which it awarded costs of $11,500 against the Coalition. The Court held that this amount "represents reasonable and necessary fees and disbursements incurred by the City of Edmonton to challenge the Coalition's public interest standing."[62]

The Court disposed of the Coalition's challenge without ever making a finding, even a preliminary one, on the merits of its legal arguments. In other words, the City's encampment policy was not tested for compliance with the *Charter*. This outcome is hardly unprecedented: many *Charter* claims brought by or on behalf of impoverished litigants have been disposed of on preliminary grounds such as lack of standing or because the issue is not justiciable.[63] Infamously, in *Tanudjaja v Ontario*, the Ontario Court of Appeal declined to hear a challenge to federal and provincial housing policy on the basis that the matters raised by the plaintiffs were not justiciable.[64] This judicial practice, of disposing of matters of public interest on preliminary issues and thereby sidestepping an analysis of the merits, is undesirable because it prevents the court from "determining the scope of the Charter rights at issue, and providing guidance in subsequent cases."[65] In the absence of judicial guidance, the conversation about what protections the *Charter* offers to unhoused people may need to be advanced elsewhere, so as to ensure that "our interpretation of the Constitution responds to the realities and the needs of all members of society."[66] The following section aims to advance this conversation by detailing how the Coalition's legal team saw the *Charter* as being implicated in the City of Edmonton's displacement practices and policies.

## IV. THE *CHARTER* ARGUMENTS: SECTION 7 & BEYOND

The Coalition had been prepared to argue its *Charter* claims as part of the three-part test for an interlocutory injunction. The three-part test requires an applicant to show that there is a serious question to be tried, that the applicant (or the persons whom it is representing) will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours granting an injunction.[67] The

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61 *Coalition for Justice and Human Rights*, Action Number 2303 15571 (Brief of the Applicant, City of Edmonton – Costs, 6 February 2024) at para 1.

62 *Coalition for Justice and Human Rights Ltd v Edmonton (City),* 2024 ABKB 148 at para 4.

63 *Canadian Bar Assn v British Columbia*, 2008 BCCA 92 (CanLII), at para 53 (not justiciable), and see Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 SCLR 297; David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51:4 UTLJ 425.

64 *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 (CanLII), at para 36, leave to appeal to SCC refused, 2015 CanLII 36780 (SCC) [*Tanudjaja*].

65 Specifically on using motions to strike against *Charter* claims, see Lorne Sossin & Gerard J Kennedy, "Justiciability, Access to Justice and Summary Procedures in Public Interest Litigation" (2019) 90 SCLR (2d) 119 at para 40, citing Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26 J L & Soc Pol'y 43.

66 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 115, as quoted in Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 J L & Soc Pol'y 10 at 36.

67 *RJR MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 at 334; *Manitoba (AG) v Metropolitan Stores Ltd,* [1987] 1 SCR 110 at 128-29. A special, five-member panel of the Alberta Court of Appeal gave direction on how this

analysis of the merits during an interlocutory injunction is limited because a court "is not in a position to undertake a detailed analysis of the complex factual and legal issues."[68] Section 1 of the *Charter* tends to be considered only briefly, if at all.[69] The evidence and arguments the Coalition prepared for the injunction hearing were designed to establish that there was a serious issue to be tried under each of the *Charter* grounds. Yet, the Coalition was also mindful that a court would weigh the relative strength of its case as "a relevant consideration in the overall assessment of whether" to grant the injunction.[70]

This section outlines the *Charter* arguments the Coalition would have made. The Coalition advanced additional arguments, sounding in tort.[71] And there are other ways in which the concerns of unhoused individuals could have been translated into legal claims, including under the *Alberta Bill of Rights*.[72] However, this article focuses on outlining the *Charter* violations alleged by the Coalition as part of its interlocutory application, to contribute to the discussion of how the *Charter* is implicated in the practice of encampment displacements.

This section will start by outlining the Coalition's section 7 claim and how it fit into the evolving interpretation of section 7 evident in other, contemporaneous encampment cases. It will then introduce and briefly describe the other *Charter* claims that the legal team developed to reflect the concerns voiced by unsheltered Edmontonians.

### A. Section 7: "We're human... we deserve to have peace and a comfortable spot to lay our heads at night"[73]

As mentioned previously, courts have largely decided encampment lawsuits through the lens of section 7, and more rarely section 15. Litigants have raised other *Charter* grounds, but courts have either held that the other sections are not violated, or that it is unnecessary for the court to perform that analysis because a finding of a violation of section 7 is sufficient for the purposes of granting a remedy.[74]

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test should be applied in the *Charter* context, see *AC and JF v Alberta*, 2021 ABCA 24. In other provinces, a different statutory test has applied, see e.g., *Bamberger v Vancouver (Board of Parks and Recreation),* 2022 BCSC 49 (CanLII), at paras 169-76 [*Bamberger*]; *Prince George (City) v Stewart*, 2021 BCSC 2089, at paras 39-40 [*Stewart*]; *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662 at 135-36 [*Kingston*]; and discussing which test should be used in injunction cases see Stepan Wood, "Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A Critical Assessment of BC Case Law" (2024) 61:1 Osgoode Hall LJ 161.

68 Jeffrey Berryman, *The Law of Equitable Remedies,* 2nd ed (Toronto: Irwin, 2013) at 88. There are two exceptions, where courts will engage in a more rigorous analysis of the merits, including if the injunction application will be determinative of the dispute and where the injunction application turns on a simple question of law, *ibid* at 88-89.

69 *Ibid*.

70 *AC and JF v Alberta,* 2021 ABCA 24 (CanLII) at para 27.

71 See *infra* note 163.

72 *Alberta Bill of Rights,* RSA 2000, c A-14. The rights enshrined in the *Bill of Rights* overlap somewhat with the *Charter,* but not entirely. For example, the *Bill of Rights, ibid,* s 1(a), includes protection for enjoyment of property, which is not reflected in the *Charter*.

73 Transcript of JB, *supra* note 45 at 20, lines 4-6.

74 In *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at paras 146-236 [*Abbotsford*], the organization challenging the constitutionality of the municipal bylaw raised arguments under sections 2(c), 2(d), 7, and 15; the Court found the bylaw violated section 7, but not under any of the other sections. In *Black, supra* note 3, the applicants challenging the constitutionality of the municipality's implementation of its bylaw raised arguments under section 7, 12, 15. In the context of an injunction application, the Court at paras 52, 62, found that there was a serious issue under sections 7 and 15. The Court made no decision regarding section 12.

Section 7 is engaged when legislation or government conduct deprives an individual of life, liberty or security of the person *and* that deprivation is contrary to the principles of fundamental justice. In other encampment cases, courts have recognized that prohibitions on sheltering in public spaces, and the legal levers used to enforce these prohibitions, may violate life, because they increase the risk of death or grievous bodily harm. They violate the liberty of unhoused people by constraining fundamental choices, including the choice of where to live.[75] They violate the security of person of unhoused people because the prohibitions, and their enforcement cause physical and psychological suffering to the people being displaced.

Section 7 protects against death and bodily harm. At the time of the Edmonton litigation, unsheltered people were dying at an alarming rate. In 2023, 302 unhoused people died in Edmonton, up from 37 in 2019.[76] They were also suffering from grievous bodily harm – including injuries attributable to Edmonton's harsh winter conditions. Homeless people were experiencing frostbite, and frostbite amputations, with concerning and increasing frequency. Between April 1, 2018 and March 31, 2019, 170 unhoused people were diagnosed with frostbite in the Edmonton area and less than 10 underwent an amputation as a result of frostbite; four years later, 376 unhoused people were diagnosed with frostbite and 21 underwent amputations.[77]

Simply being unhoused during winter puts a person at a heightened risk of cold weather injuries and, ultimately, death. Yet, there were reasons to believe that the City's encampment displacement policy was putting unsheltered people at a heightened risk for these serious outcomes. Displacement often caused unhoused people to lose shelter, bedding and other property that they needed to stay warm. For example, one described how after repeatedly losing tents in displacements, she had to walk all night to stay warm.[78] The unhoused affiants described experiencing pneumonia, frostbite and hypothermia following displacements.[79] An emergency physician who treated many unhoused Edmontonians attested that the

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75 In *Godbout v Longueil,* [1997] 3 SCR 844 at paras 62-69, La Forest, L'Heureux-Dubé and McLachlin JJ (concurring in the result) held that the right to choose where one lives is protected by the liberty interest in section 7, and in reaching that conclusion noted that such a right was protected by Article 12 of the *International Covenant on Civil and Political Rights*, 19 December 1966, Can TS 47 (entered into force 23 March 1976, accession by Canada 19 May 1976); in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (CanLII), [2011] 2 SCR 670, at para 93 the Court held that the question of whether one's place of residence was protected under section 7 remained unsettled.

76 Paige Parsons, "Homeless people in Edmonton are dying at 8 times the rate as pre-pandemic", *CBC News* (21 March 2024), online: <www.cbc.ca/news/canada/edmonton/homeless-people-in-edmonton-are-dying-at-8-times-the-rate-as-pre-pandemic-1.7149005>. During that same time period, the homeless population in Edmonton had roughly doubled, see *supra* note 27. The evidentiary record before the Court in the Coalition's case indicated that 157 people unhoused people and 183 housed people in Homeward Trust programs had died between October 2021 and November 18, 2023 see *Coalition for Justice and Human Rights*, Action No 2303 1557 (Undertakings from SMc, filed 5 December 2023) at 3.

77 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Sandy Dong, affirmed 29 November 2023), Exhibit C at 2 [Affidavit of Sandy Dong #2]. The second set of numbers is for the period between April 1, 2022 and March 21, 2023.

78 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of AR, affirmed 18 August 2023) at para 5 [Affidavit of AR]; see also *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of TSe, affirmed 18 August 2023) at para 7 [Affidavit of TSe].

79 Affidavit of TSe, *supra* note 78 at para 3; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of TSc, affirmed 18 August 2023) at para 5 [Affidavit of TSc]; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of DG, affirmed 25 August 2023) at para 6 [Affidavit of DG]; Affidavit of AR, *supra* note 78 at para 5.

City's encampment displacement policy likely "increased [the] risk of death and injury from exposure to cold among unsheltered Edmontonians when there is inadequate, accessible shelter and housing available."[80]

Section 7 protects against physical and psychological suffering. The displacements caused both. Some of the affiants were forcibly and violently removed.[81] Some described being verbally humiliated during the process.[82] But even absent these aggravating factors, the forced evictions were gruelling. Moving is miserable even in the best circumstances, and these were not the best circumstances: the relocations were involuntary and time-pressured. In questioning, one described the physical toll that moving took on her: "By the time I was done I was so exhausted I could barely move, and I was in so much pain."[83] Another described the psychological impacts: "Getting displaced sets me back. It causes me worry and difficulties. The day after a displacement is hard. It takes time to recalibrate and recover".[84]

For a section 7 violation to be established, the deprivation of life, liberty or security of person must be done in a manner that departs from the principles of fundamental justice. Principles of fundamental justice reflect our basic values.[85] They are procedural and substantive legal safeguards that are deeply rooted in the history of Canadian legal institutions, derived from the explicit protections in the *Charter*, or animated by human dignity and autonomy.[86] Courts have recognized multiple principles of fundamental justice, yet have given particular emphasis to three ways in which these principles are violated: arbitrariness, overbreadth, and gross disproportionality.[87]

In encampment cases, courts have primarily found section 7 violations on the basis that the deprivations of life, liberty and security of person are overbroad and grossly disproportionate.[88] A restriction is

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80 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Sandy Dong, affirmed 15 September 2023) at para 12. He also concluded that displacements put unhoused people at a heightened risk of dying from an overdose at para 14.

81 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of RFC, affirmed 23 August 2023) at paras 8-9 [Affidavit of RFC]. Describing being violently removed from a transit station, see *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of PS, affirmed 25 August 2023) at para 2 [Affidavit of PS].

82 Affidavit of AR, *supra* note 78 at para 3; Affidavit of PS, *supra* note 81 at para 1.

83 Transcript of LW, *supra* note 46 at 32, lines 19-20.

84 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of RNSY, affirmed 13 July 2023) at para 12 [Affidavit of RNSY].

85 Jonnette Watson Hamilton and Jennifer Koshan, "Sharma: The Erasure of Both Group-Based Disadvantage and Individual Impact" (2024) 114 SCLR 113 at para 48 (QL) citing *Canada (Attorney General) v Bedford*, [2013] 3 SCJ No 72, 2013 SCC 72 (SCC) at para 96.

86 Nader R Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2012) 63 SCLR 339 at 341-42.

87 Andrew Menchynski & Jill Presser, "A Withering Instrumentality: The Negative Implications of *R v Safarzadeh-Markali* and other Recent Section 7 Jurisprudence" (2019) 81 SCLR 75 at 82-84 list some of the other principles of fundamental justice recognized by Canadian courts, but at 85 they note that the Supreme Court of Canada has limited its analysis in recent section 7 cases to the principles of arbitrariness, overbreadth and gross disproportionality. But see Martha Jackman, "Wizened Stump or Living Tree? Section 7 Principles of Fundamental Justice" in Howard Kislowicz, Richard J Moon & Kerri Anne Froc, *Canada's Surprising Constitution* (Vancouver: UBC Press, 2024) 260 calling for courts to adopt a "expansive, right-affirming approach" to the principles of fundamental justice that includes the principle of non-discrimination, as well as "other domestic and international human rights norms" at 275, 277.

88 The lower court in *Victoria (City) v. Adams,* 2009 BCCA 563 ["*Adams*"] held that the deprivations were arbitrary, but was reversed on appeal and developments in *Charter* jurisprudence since that case have led subsequent courts to focus on overbreadth and gross disproportionality. For recent analyses on this issue see *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained,* 2023 ONSC 670 at 109-119 [*Waterloo*]; *Kingston, supra* note 67 at 82-87.

overbroad when it is "more broadly framed than necessary to achieve the legislative purpose."[89] A restriction is grossly disproportionate when its negative impact on affected persons is "completely out of sync with the object of the law"; it is a high standard.[90]

Determining if a law is overbroad or grossly disproportionate involves weighing its framing or impact against its purpose or object. The City of Edmonton did not explicitly articulate the purpose of the encampment policies, but rather asserted that the purpose could "be expressly found or inferred from the content of [relevant reports and correspondence considered by Council on matters touching on homelessness and encampments] along with the evidence filed by City personnel involved in the application of the bylaws and policies."[91]

The City's evidentiary record indicates that its encampment framework aimed to address risks posed by encampments to different constituencies. The City argued that encampments posed safety and health risks to people living in them (e.g., through disease transmission, and cold weather injuries); to neighbouring residents and businesses (e.g., through theft, trespass and threats of violence); to the City's parks system (e.g., through uncontrolled fire and tree removal), and to City employees and other workers who frequented encampments (e.g., through the presence of needles and human waste).[92] Additionally, the City emphasized evidence from the Chief Executive Officer of a local organization that distributes government funding to housing service providers. Her view was that "the entrenchment of encampments impedes housing efforts."[93] In other words, she felt that allowing people to remain in encampments made them harder to house.

The Coalition's position was that none of the risks posed by encampments were ameliorated by displacing people. Rather, displacements merely moved the risks from one location to another and, in the process, caused serious harm to encampment residents.

The City's encampment risk matrix points to how their displacement policy was overbroad and grossly disproportionate. The matrix identified 14 risk factors that City employees would use to evaluate an encampment as either low, medium, or high risk. All encampments would eventually be displaced, but how quickly the City acted depended on an encampment's risk level. Low risk encampments were closed down in approximately 26 days, whereas medium risk encampments were closed in 10-15 days.[94] The aim of the City was to close high-risk encampments down within 1-3 days, however, this time frame was often infeasible given the City and Police's available personnel.[95] An encampment classified as "high

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89 *Waterloo, supra* note 88 at para 109.

90 *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331, at para 89.

91 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Injunction Brief of the City, filed 28 August 2023) at para 52 [Injunction Brief of the City]. It is not alone in taking this approach, see e.g. *Kingston, supra* note 67 at para 83.

92 Injunction Brief of the City, *supra* note 91 at paras 15-18; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of FR, sworn 7 November 2023) at paras 6, 14-23 ["Affidavit of FR"]; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of BF, sworn 9 November 2023) at paras 15, 24, 31-42; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of DGr, sworn 7 November 2023) at para 13 ["Affidavit of DGr"]; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of James Talbot, sworn 8 November 2023) at paras 21, 24, 26-30.

93 Injunction Brief of the City, *supra* note 91 at para 19.

94 Affidavit of FR, *supra* note 92 at paras 8-9.

95 *Ibid* at para 10.

risk" could also be closed down during extreme cold, extreme heat or during periods with poor air quality.[96]

The matrix allowed for the accelerated closure of encampments based on some factors that did not exacerbate the risks to the relevant constituencies. For example, factors that could lead to an encampment being classified as high risk included if it had more than 6 people, more than 8 structures, or had been in place for more than 26 days.[97] Identifying the size or longevity of an encampment as a "risk factor" means that even where encampment residents did everything they could to keep their encampment clean and minimize impact on nearby residents and businesses, they would still be targeted for accelerated removal if they remained in one place for more than 26 days or grew beyond the limits specified in the matrix.

Some of the risk factors were counterintuitive. An encampment would be targeted for accelerated closure if "occupants are unable to protect themselves from the elements."[98] Responding to such a situation by displacing residents seems illogical, since displacements often result in residents losing their shelters and other survival property, further reducing their ability to protect themselves from the elements.[99]

The different levels of "risk" in the matrix suggested that the City was calibrating its approach to encampment closures by only closing the riskiest encampments on an accelerated basis. However, this calibrated approach was not borne out in practice. Although the City had three levels of "risk"; most encampments were classified as "high risk". The Edmonton Police Service's response to one of Chris's freedom of information requests revealed that between May 1 and September 3, 2022 a total of 733 camps had been evaluated, and 694 (94%) had been classified as high or extreme risk.[100] In answers to undertakings, a supervisor of the City's park rangers indicated that between October 21, 2021 and October 23, 2023, the City had evaluated 1488 encampments and 1217 (82%) had been classified as high risk.[101] During that same time period, the City had closed 138 encampments during periods when its extreme weather protocols were in effect, 40 of these had been closed during periods of extreme cold.[102]

The City's matrix allowed for the aggressive labelling of encampments as "high risk" based on criteria that was not obviously related to the City's risk-mitigation aims. High risk encampments were displaced at an accelerated pace. The City carried out some of these displacements during periods of extreme cold, and without regard to whether there was anywhere else for the encampment residents to take shelter.[103]

The lack of adequate alternate shelter was key in the initial Canadian encampment case of *Victoria v Adams*. The British Columbia Court of Appeal held the section 7 rights of unhoused people were violated

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96 *Ibid* at para 16, Exhibit B. The City defined an "extreme weather" event as when there had been three consecutive days of temperatures below -20C, daytime highs above 29C or an air quality index above 7.

97 Affidavit of FR, *supra* note 92 at Exhibit B.

98 *Ibid*.

99 Affidavit of Sandy Dong #2, *supra* note 77 at para 3(iv).

100 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Devyn Ens, sworn 15 September 2023) at para 11, Exhibit H [Affidavit of Devyn Ens #1]. The City of Edmonton responded to a separate freedom of information request and indicated it did not track how many encampments were evaluated as high risk, *ibid*, Exhibit G.

101 *Coalition for Justice and Human Rights Ltd v The City of Edmonton,* Action No 2303 1557 (Undertakings of TC, filed 5 December 2023) at 3-4. These numbers did not include encampments closed on transit right of ways.

102 *Ibid* at 5. The other 98 were closed during period of extreme heat or bad air quality.

103 Officers did not have access to information about the availability of shelter spaces when closing encampments, *Coalition for Justice and Human Rights*, Action No 2303 1557 (Transcript of Questioning of TC, 23 November 2023) at 19, line 6 to 20, line 12; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Transcript of Questioning of FR, 21 November 2023) at 3, lines 1-8.

if they were prohibited from erecting temporary overnight shelters in public spaces *as long as* there were insufficient indoor options for them.[104]

Crucially, in Edmonton, there were insufficient shelter beds for the number of unhoused people. Both the number of shelter spaces and unhoused people varied, but as of November 2023, *at least* 1359 unhoused people needed shelter[105] but there were *at most* 952 operational spaces.[106] Shortly after the Coalition had filed its Statement of Claim, the Province had committed to providing additional funding so that Edmonton would have 1727 shelter spaces,[107] but it failed to implement this promise in time to provide refuge for unhoused people during the coldest months of the 2023-2024 winter.[108]

Since *Adams*, litigants have contested the scope of the right to shelter protected by section 7. At the time the Edmonton encampment litigation was going forward, the scope of the right to shelter was in a state of flux. Courts were grappling with three aspects of this right.

The first issue was whether section 7 might protect the right of unhoused people to establish continuing encampments. In some cases, courts held that the section 7 rights of unhoused people to shelter remained limited to erecting *temporary*, *overnight* shelters.[109] In others, courts either explicitly or implicitly restrained municipalities from interfering with continuing encampments.[110] In the Edmonton encampment litigation, the Coalition was seeking relief that would have allowed individuals to remain in encampments on a continuing basis.

The second issue was how courts should assess whether there were adequate indoor shelter spaces for unsheltered individuals. In some cases, the court's analysis has been strictly quantitative. If there were inadequate indoor shelter spaces for the number of unhoused people in a municipality, then people had a

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104 *Adams, supra* note 88 at paras 4-5; and see Margot Young, "Sleeping Rough and Shooting Up: Taking British Columbia's Urban Justice Issues to Court" in Martha Jackman & Bruce Porter, eds, *Realizing Social Rights* (Toronto: Irwin, 2013) 413-441.

105 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of SG, sworn 8 November 2023) at para 12. This is the number of homeless people who are not provisionally housed, according to Homeward Trust's by-names list as of November 7, 2023. See also Affidavit of Devyn Ens #1, *supra* note 100 at Exhibit B, 12, 18-19; *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Devyn Ens, sworn 29 November 2023) at Exhibit B, 44-45.

106 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Damian Collins, affirmed 29 November 2023) at para 12. This data was based on Homeward Trust's dashboard as of November 19, 2023. See also *Coalition for Justice and Human Rights*, Action No 2303 1557 (Transcript of Questioning of SMc, 20 November 2023) at 62, lines 6-11 [Transcript of SMc].

107 Affidavit of SG, *supra* note 105 at para 9.

108 Government of Alberta data showed shelter capacity of 1276 in January 2024 and 1343 in February 2024. There were 16 separately funded youth shelter spots. The Government of Alberta included transitional and short term housing in its "shelter data"; although these spots often require waitlists to get in and thus are not immediately available to people living on the streets. Yet, even with these numbers added in, the available shelter spots for January and February 2024 would be 1587 and 1654, short of the promised 1727.

109 In *Kingston, supra* note 67 at paras 112-13, the Court held that litigants might be able to establish that a prohibition on daytime sheltering is unconstitutional, but the evidence before it was insufficient in this regard and thus limited its remedy to overnight sheltering; see also *Johnston v Victoria,* 2011 BCCA 400.

110 See the discussion in *Bamberger, supra* note 67 at para 18, of *British Columbia v Adamson,* 2016 BCSC 584 and *Stewart*, *supra* note 67; and see also *Waterloo, supra* note 88 at para 105.

right to shelter outside.[111] In cases involving the relocation of a specific encampment, some courts further restricted their analysis to asking whether there were sufficient (in number) shelter spaces for the residents of that *specific encampment*.[112] At the other end of the spectrum, some courts held municipalities to a higher threshold, requiring them to prove that there were adequate (in number) shelter spaces that would be *accessible* to the encampment residents and other unhoused people in the community.[113] These courts recognized that many features of a shelter space may make it inaccessible to an unhoused person. For example, a person who uses a mobility device may not be able to access a shelter with stairs at the entrance.[114] In the Edmonton encampment litigation, the Coalition sought an injunction that would have prevented the City from closing encampments unless there was emergency shelter space that the encampment residents were "able and eligible to access."[115]

The third issue was determining the scope of procedural fairness obligations that municipalities owe to encampment residents prior to removing them. The British Columbia Supreme Court considered this issue in its decision in *Bamberger v. Vancouver*. The Court had been asked to judicially review two orders made by the General Manager of Vancouver Board of Parks and Recreation, initially restricting overnight sheltering in a specific park, and then closing the park down to the public. The Court held that these orders were administrative decisions that engaged the section 7 rights of unsheltered people who were residing in the park, and thus the decisions should have been made in a way that was procedurally fair to those residents.[116] The Court declined to "design a fair process", leaving the General Manager to determine the specifics of that process, but indicated that it should provide unsheltered residents of the park with notice of the proposed order and a right to be heard.[117]

In the Edmonton encampment case, the Coalition asked for relief that included a procedural requirement.[118] At least 48 hours prior to closing an encampment, the Coalition wanted the City to post a notice of intended closure on affected structures. The notice would specify the risk factors identified in the encampments and what steps the residents could take to address the risks and avoid closure. The notice would also identify which bylaw(s) the encampment was violating. Additionally, the Coalition asked that the City be required to post this notice on structures that City workers believed were abandoned. People living in encampments described how shelters were often dismantled on the basis that they were abandoned, when in fact the residents had only left them temporarily.

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111 In *Poff v City of Hamilton,* 2021 ONSC 7224, the Court found a serious issue under section 7, at paras 94-95; but ultimately decided against granting an injunction because it held that there were sufficient shelter spaces to accommodate the city' unhoused population at paras 230-242. In *Kingston, supra* note 67 at paras 18, the Court held that there were not enough spaces for the unhoused people in that municipality. The Court in *Kingston* was alive to concerns around the accessibility of those shelter spaces. The Court granted a remedy allowing for overnight sheltering in public spaces and refused to make that remedy contingent on their being an inadequate number of accessible shelter beds, because it would be exceedingly complex for the Court to determine when this criterium was met, *ibid* at paras 125-33.

112 *Church of Saint Stephen et al v Toronto,* 2023 ONSC 6566 at paras 18, 60.

113 *Abbotsford, supra* note 74 at para 82; *Stewart, supra* note 67 at para 74; *Bamberger, supra* note 67 at para 15; *Prince George (City) v Johnny,* 2022 BCSC 282 (CanLII) at para 79; *Waterloo, supra* note 88 at para 93.

114 *Upholding Dignity, supra* note 25 at 16.

115 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Amended Amended Application, filed 12 December 2023) at para 1.a.1 ["Amended Amended Application"].

116 *Bamberger, supra* note 67 at paras 62-64.

117 *Ibid* at paras 66, 69.

118 Amended Amended Application, *supra* note 115 at para 1.a.2.

Before concluding this section, it bears mentioning that encampment cases have not grappled with the question – left open by the Courts in *Gosselin* and *Tanudjaja* – of whether section 7 imposes positive obligations on governments to ensure that Canadians have a minimum standard of living, including adequate shelter.[119] Encampment litigants have been able to sidestep this question because the relief sought fits neatly into a negative rights paradigm, in essence, demanding only that the state refrains from actively displacing unhoused individuals.[120] However, as the Office of the Federal Housing Advocate highlights in its report on encampments, there is much more that all levels of government should be doing to "respond to homeless encampments in compliance with Canada's human rights dimensions."[121] For example, the report calls on municipal governments to "provide dignified access to… essential facilities and services such as clean drinking water, sanitation, cooking facilities and waste collection."[122] Future litigants may wish to frame their section 7 arguments to highlight how the state's failure to fulfill these positive obligations violates the life, liberty and security of person of encampment residents.

Section 7 is a vital part of the encampment analysis, because it underlines how displacements cause serious, lasting, and sometimes irreversible harm to unsheltered people. These harms are properly the subject of concern. Yet, unhoused Edmontonians were not only concerned with these grievous risks. In their conversations with Judith and Chris, they talked about the importance of community, the loss of property, the ways in which displacements dehumanized them, and the distinct harms they experienced as Indigenous peoples. The Coalition advanced additional *Charter* claims to reflect these concerns.

### B. Section 2: "I believe that I am safer when I stay with people. I have their back and they have mine. Nobody else has our back."[123]

Section 2 of the *Charter* protects fundamental freedoms including the freedom of peaceful assembly and the freedom of association. These freedoms often overlap, but peaceful assembly refers to physical gatherings whereas association refers to the ability of people to act collectively.[124] The Coalition advanced

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119 *Gosselin v Québec (Attorney General),* 2002 SCC 84 (CanLII), [2002] 4 SCR 429, at para 82-83; and see Arbour JA in dissent at paras 335-358; *Tanudjaja, supra* note 64 at para 37 and see Feldman JA in dissent at para 62. Exploring the arguments in favour of section 7 including positive obligations, see Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 NJCL 85 at 94-99 [Jackman, "One Step Forward"; Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279-301; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539.

120 Jackman, "One Step Forward", *supra* note 119 at 118.

121 *Upholding Dignity, supra* note 25 at 21

122 *Ibid* at 29.

123 Affidavit of PS, *supra* note 81 at para 2.

124 On freedom of peaceful assembly, see Basil Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 Western J Leg Stud Art 4; Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms" (2020) 98 SCLR (2d) 351; Kristopher E G Kinsinger, "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 SCLR (2d) 377; on freedom of association see André Schutten "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98 SCLR (2d) 399.

claims under section 2, because these protections reflected what the legal team heard from unsheltered people: that living in an encampment made them feel safer.[125]

This feeling of safety resulted from the physical gathering of people in an encampment and the relationships that they built with each other. The unhoused affiants described the benefits flowing from being in these communities. They could protect each other from outsiders who might be violent towards them.[126] When an encampment resident experienced a drug poisoning,[127] or suffered a cold-related injury such as hypothermia, [128] other residents could respond with lifesaving interventions. They were able to share resources, including shelters.[129] They could share important information, including about upcoming displacements.[130] When they were displaced, they could help each other move. Staying in encampments also enabled residents to remain close to family[131] and companion animals.[132]

The safety available in encampments may be especially important for unhoused women. Kaitlin Schwan, then the Executive Director of the Women's National Housing and Homelessness Network, gave expert evidence in support of the Coalition's claim and highlighted the importance of encampments for keeping unhoused women safe.[133] The unhoused affiants confirmed as much. One woman described how: "When I stay in an encampment alone, I feel much more vulnerable, when I stay with other people, I feel more safe and secure."[134] Another said: "I believe that I am safer when I stay with people."[135]

The City's encampment framework undermined the ability of people to stay together and to build these reciprocal networks of care. It specifically targeted assembling. Having more than six people in an encampment was a factor that weighed in favour of the encampment being classified "high risk".[136] When people were displaced, they frequently lost contact with each other and thus were prevented from taking care of each other.

The British Columbia Supreme Court had previously rejected section 2 claims in the encampment context. The organization representing unhoused people in *Abbotsford v Shantz* had argued that a municipal bylaw violated the freedoms of association and assembly of unsheltered people because it

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125 The Office of the Federal Housing Advocate, in its final report on encampments, also called on municipal governments to "prohibit any restrictions on freedoms of association and assembly", *Upholding Dignity, supra* note 25 at 34.

126 Transcript of JB, *supra* note 45, at 22, line 17- 23, line 1 (describing lack of safety after displacement from an encampment).

127 Affidavit of Sandy Dong #2, *supra* note 77 at para 3(v); Transcript of Sam Mason, *supra* note 30 at 38, line 22 to 39, line 3.

128 Transcript of RNSY, *supra* note 46, at 28, line 15- 29, line 7.

129 Transcript of LW, *supra* note 46 at 19, lines 20-25; Transcript of JB, *supra* note 45, at 33, lines 5-8.

130 Transcript of LW, *supra* note 46 at 17, lines 10-12.

131 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Questioning of RFC, 27 September 2023), at 7, lines 24-27; 21 lines 1-8.

132 Transcript of RNSY, *supra* note 46 at 17, line 22- 18, line 18.

133 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Kaitlin Schwan, sworn 21 September 2023) at para 38.

134 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of LW, affirmed 13 July 2023) at para 13 [Affidavit of LW].

135 Affidavit of PS, *supra* note 81 at para 2.

136 Affidavit of FR, *supra* note 92 at Exhibit B.

prohibited them from sheltering in public spaces. The Court held that neither freedom entitled unhoused people to use a public space "for a purpose for which it is not generally intended."[137]

Yet, the Court's analysis in *Shantz* fails to recognize the life-preserving role of encampments. Unsheltered residents in encampments are not merely using public space in an unintended way: they are not recreational campers who have commandeered public space to pitch their tents. Unsheltered residents in encampments are gathering physically (assembling) and building connections (associating) to protect themselves against threats and provide each other with a sense of belonging. The Supreme Court of Canada has recognized that the freedom of association has a derivative aspect: it protects "the right to associational *activity* that specifically relates to other constitutional freedoms." [138] In Edmonton, unsheltered people were associating and assembling as "essential, life-sustaining acts,"[139] to protect their life, liberty, and security of person.

A further aspect of encampment cases that indicates the freedom of association is engaged is that unhoused people are finding strength in numbers. Empowering otherwise marginalized individuals through collective action is central to the freedom of association. The Supreme Court of Canada describes this purposive aspect of freedom of association as protecting "collective activity that enables 'those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict'."[140] In determining what activities are protected by freedom of association, the relative power of the parties should be a guiding principle: "Section 2(d) of the Charter is aimed at reducing social imbalances, not enhancing them".[141] As a result of this corrective focus, freedom of association is particularly relevant to the "most easily ignored and disempowered individuals", because it protects their ability to enhance their strength "through the exercise of collective power." [142] The encampment residents were exercising their collective power to survive in harsh, often threatening conditions. As one resident described it: "In encampments we support each other. I believe we depend on each other."[143]

### C. Section 8: "Just the way things get thrown to the curb and thrown in the garbage like they were nothing to nobody"[144]

When unhoused people were meeting with Chris and Judith prior to the launch of the encampment litigation, they frequently voiced concerns about how they lost property during displacements. They lost survival items such as tents, blankets, heaters, and bikes. The loss of this property increased their risk of injury and death. They also lost property like identification and telephones, which they needed to function and to stay in touch with support workers. And they lost property that held sentimental value.

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137 *Abbotsford, supra* note 74 at paras 162, 168.

138 *Mounted Police Association of Ontario v.Canada (Attorney General),* 2015 SCC 1 (CanLII), [2015] 1 SCR 3, at paras 51-54 [*Mounted Police*].

139 *Adams, supra* note 88 at para 4.

140 *Mounted Police, supra* note 138 at paras 51-54, citing *Reference Re Public Service Employees Relation Act* (*Alta*), [1987] 1 SCR 313 at 366.

141 *Ibid* at para 59.

142 *Ibid* at paras 57, 70.

143 Affidavit of RNSY, *supra* note 84 at para 8.

144 Transcript of JB, *supra* note 45 at 14, lines 20-22.

The City or police might seize property if the personnel carrying out the displacements thought it was unsafe. The City had a policy of seizing propane tanks because of the risk that they might explode if stored improperly.[145] However, people staying outside need to stay warm, especially during Edmonton winters. When their propane tanks were seized, they would often have little choice but to resort to even more unsafe ways of staying warm. Two affiants described how, after their propane tanks were seized, they would stay warm in their tents by starting a fire in a bucket.[146]

Property was lost or destroyed in other ways, too. Property might be damaged during displacements. Encampment residents reported that the personnel carrying out displacements sometimes slashed or otherwise damaged their tents.[147] The City or police might seize property if they thought it was stolen. Several unhoused affiants described that if they had any valuable property in their possession, the police would assume it was stolen.[148] Encampment residents may leave property behind and have it disposed as garbage. Sometimes they left property behind because they had insufficient time to pack up.[149] Other times, their encampment was thrown out while they were temporarily away from it.[150] One affiant described how: "not knowing if my belongings will be safe if I leave my encampment makes my life much more difficult and stressful."[151]

Section 8 of the *Charter* protects people from unlawful search or seizure. For section 8 to be engaged, (1) the state must have conducted a search or seizure, and (2) the search or seizure must not have been authorized by a law, authorized by an unreasonable law, or carried out in an unreasonable manner.[152] The Coalition believed that the seizure and disposal of property was being carried out without lawful authority and thus was a violation of section 8 of the *Charter.*

Section 8 is most commonly used in the context of criminal investigations, however, nothing about the language in the section limits it to this context. There is precedent for arguing that the seizure of property from an unhoused person can amount to a section 8 violation. In *R v Tanton,* an unhoused person had left his cart in a parking lot that was adjacent to and owned by a drop-in centre in Kelowna, British

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145 Affiants describing having their propane tanks seized: *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of LR, affirmed 13 July 2023) at para 5; Affidavit of LW, *supra* note 134 at para 4. Between January 1 and September, 2023 the City recorded seizing 963 propane tanks, Affidavit of DGr, *supra* note 92 at para 14.

146 Affidavit of AR, *supra* note 78 at para 6; Affidavit of TSc, *supra* note 79 at para 6.

147 One affiant described her tent being slashed, see Affidavit of LW, *supra* note 134 at para 6, which was a common complaint amongst unhoused people, see MAPS Alberta Capital Region, *Staying Outside is Not a Preference* (Edmonton: City of Edmonton, 2023) at 34 online: *MAPS* <mapsab.ca/wp-content/uploads/2023/02/Outside-Not-a-Preference-Final-Report-Feb-2023.pdf>. The City provided evidence that it would only slash tents in rare instances, see Affidavit of DGr, *supra* note 92 at para 9; Affidavit of FR, *supra* note 92 at para 17; Affidavit of TC, *supra* note 26 at para 22 & Exhibit A.

148 Affidavit of AR, *supra* note 78 at para 4; Affidavit of RFC, *supra* note 81 at para 8; Affidavit of TSe, *supra* note 78 at para 8.

149 Affidavit of DG, *supra* note 79 at para 3; Affidavit of LR, *supra* note 145 at para 2a; Affidavit of LW, *supra* note 134 at para 5; Affidavit of RFC, *supra* note 81 at para 6.

150 Affidavit of AR, *supra* note 78 at para 8; Affidavit of LR, *supra* note 145 at para 4; Affidavit of PS, *supra* note 81 at para 3; Affidavit of RNSY, *supra* note 84 at para 6; Affidavit of TSc, *supra* note 79 at para 8.

151 Affidavit of LR, *supra* note 145 at para 7. The authors describe this as a "siege mentality" in Nicholas Blomley et al, "Belongings Matter: Possessions of Precariously Housed People*"* (2024) at 24, online: *Belongings Matter* <https://belongingsmatter.ca/report/introduction>.

152 *R v Shephard,* [2009] 2 SCR 527 at para 15.

Columbia.[153] A City Bylaw Officer seized his cart after being asked to do so by a member of the RCMP. The unhoused individual was angry that his cart had been seized and went to City Hall to lodge a complaint. He swore at City staff and uttered a threat as he was leaving. He was charged with offences including uttering a threat. The Court found that the seizure of the cart violated the unhoused individual's section 8 rights because the RCMP had insufficient justification for requesting that the cart be seized. As a remedy, the Court granted a judicial stay of the charge of uttering a threat.

In the Edmonton litigation, the City argued that section 8 is concerned with protecting privacy and not property.[154] Yet, when a person is living unsheltered, these concepts are inextricably entwined. Their personal property is their home.[155] And section 8 provides heightened protection to peoples' homes, because people have a heightened expectation of privacy in their homes: they are "the place where our most intimate and private activities are most likely to take place."[156] For unhoused people, these intimate and private activities are taking place in their tent or other shelter.

It was not clear to the Coalition what authority the City was relying on to seize property from unhoused people. Unhoused people were not being provided this information.[157] To the extent that there were laws authorizing these seizures, the Coalition argued that they ran afoul of the *Alberta Personal Property Bill of Rights*. [158] This statute was adopted in Alberta in 1998 to protect against the Crown seizing personal property without providing compensation to the property's owner.[159] It achieves this aim by rendering any provincial enactment that would allow for uncompensated seizure "of no force and effect".[160] It has been rarely used in practice.[161] And yet, any law that empowered the City to seize and dispose of unhoused people's property without providing compensation would appear to run afoul of, and be rendered inoperative by the *Alberta Personal Property Bill of Rights*.

Monetary damages are available as a remedy to compensate for *Charter* violations,[162] yet the Coalition did not seek any compensation from the City. Its aim was to force the City to change its practices around

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153 *R v Tanton,* 2006 BCPC 226, as discussed in *Belongings Matter*, Blomely et al, *supra* note 151 at 14.

154 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Special Chambers Brief of the City of Edmonton, filed 20 December 2023) at para 39.

155 Sarah Ferencz et al, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 McGill LJ 369.

156 *R v Tessling*, 2004 SCC 67 (CanLII), [2004] 3 SCR 432 at para 22.

157 See e.g. the Transcript of LW, *supra* note 46 at 18, lines 5-12.

158 *Alberta Personal Property Bill of Rights*, RSA 2000, c A-31.

159 SA 1998 cA-35.05. The bill was a provincial response to the federal government's planned gun control legislation, yet does not purport to limit the operation of federal legislation: Alberta, Legislative Assembly, *Alberta Hansard*, 24-2 (9 February 1998, 1:30pm) at 242-43 (Howard Sapers); Mark Lisac, "Property Rights Bill Shot Full of Holes", *Edmonton Journal* (10 February 1998) at A12.

160 *Alberta Personal Property Bill of Rights*, *supra* note 158, ss 2, 4.

161 As of the writing of this article, a search on CanLII reveals only one case citing to this legislation, *Alberta (Justice and Attorney General) v. Echert,* 2013 ABQB 314 at para 51.

162 *Vancouver (City) v Ward,* 2010 SCC 27 (CanLII), [2010] 2 SCR 28 at para 4. In Miami, four unhoused people were awarded $300,000 in damages to settle their lawsuit over their loss of property during the city's periodic street clean ups, see Joey Flechas, "Homeless Miamians get $300,000 settlement after city trashed their personal property" *Miami Herald* (9 February 2024), online: <ca.news.yahoo.com/homeless-miamians-300-000-settlement-100000674.html>.

the seizure and disposal of property belonging to unsheltered people, and thus the Coalition asked only for declaratory relief.[163]

### D. Section 12: "It upsets me greatly that the City treats me like this… Treating me like I don't matter because I don't have a house" [164]

The Coalition wished to advance an argument about how displacements harm human dignity and did so by raising a claim under section 12. Section 12 protects "human dignity and the inherent worth of individuals" by "prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment."[165] Repeated encampment displacements, carried out against people who have no other choices about where to shelter, are dehumanizing and degrading.

To establish a section 12 violation, an applicant must show that they have been subject to either punishment or treatment at the hands of the state. In *Rodriguez*, the Supreme Court of Canada held that a prohibition on specified activities without *something more* could not amount to "treatment".[166] The *something more* could include positive action, or a situation where the prohibition was imposed on someone who was already under the administrative control of the state (e.g., prisoners or refugee claimants).[167] The Coalition argued that the prohibition on sheltering in public spaces, combined with the City taking active steps to remove people from those spaces, amounted to treatment for the purposes of section 12.[168]

The state's treatment of an individual will violate section 12 if it is incompatible with human dignity, either because it is excessive or because it is degrading and dehumanizing.[169] The Coalition argued that the City's practice of regularly removing people from encampments was cruel and unusual because it amounted to a *de facto* banishment of unsheltered people from the City.[170] There was nowhere in the City where they could legally exist. They had no homes of their own. Some of the unhoused affiants had been on waitlists for homes for lengthy periods of time.[171] The shelters were inadequate. If they stayed on other

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163 Statement of Claim, *supra* note 33 at para 73(f), the Coalition also asked for declaratory relief that taking property without consent, lawful authority, or compensation amounted to the torts of trespass to chattels and conversion.

164 Affidavit of PS, *supra* note 81 at para 5. For an in-depth treatment of how section 12 applies in encampment displacements, see Laura Soproniuk, "A Cruel and Unusual Solution to Tent Cities: Applying Section 12 to Encampment Litigation" [unpublished, on file with author].

165 *Quebec (Attorney General) v 9147-0732 Québec inc,* 2020 SCC 32 (CanLII), [2020] 3 SCR 426, at para 51 (concurring reasons).

166 *Rodriguez v British Columbia*, [1993] 3 SCR 519 at 611.

167 *Ibid*; *Canadian Doctors For Refugee Care v Canada (Attorney General)*, 2014 FC 651 (CanLII), [2015] 2 FCR 267 at paras 581-85.

168 On the possibility for expansive readings of section 12, see *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan,* 2024 SKKB 23 at paras 84-103.

169 *R v Bissonnette*, 2022 SCC 23 (CanLII) at paras 60-69.

170 Advancing a similar argument, albeit not under section 12, see *Stewart*, *supra* note 67 at para 33. In the American context, courts have held that it amounts to cruel and unusual punishment under Article 8 of the American constitution for a municipality to "prosecute people criminally for sleeping outside on public property when those people have no home or other shelter to go to, see *Martin v Boise,* 902 F (3d) 1031 (9th Cir 2018) (amended by 920 F 3d 584 at 40), but see the recent decision of the United States Supreme Court, decided after the Edmonton encampment litigation was over, holding that such ordinances are not cruel and unusual punishment, *City of Grant Pass, Oregon v Johnson*, 603 US ____ (2024).

171 Transcript of LR, *supra* note 46 at 22, line 11; Transcript of LW, *supra* note 46 at page 30, line 19.

people's private property they would be trespassers. They could not stay in transit stations, which were locked up overnight.[172] When they stayed on public property, they were repeatedly displaced and with each displacement they risked losing key items of personal property, further imperiling their ability to survive.[173] University of Alberta Professor of Human Geography, Damian Collins, provided expert evidence in which he described a "cycle of enforcement and displacement" that "can exacerbate feelings of hopelessness, stress and alienation."[174]

Repeated displacements gave unhoused affiants the message that they were not valued. One of the unhoused affiants described the dehumanizing impact of displacements on her:

> It upsets me greatly that the City treats me like this – always telling me to move, taking my property, treating me like I don't matter because I don't have a house. Treating me like I'm not part of society because of circumstances outside of my control.[175]

**E. Section 15: "I had to take down my tipi and I went and set it up in front of City Hall."[176]**

Section 15 protects Canadians from discrimination. Early cases have recognized that the goal behind section 15 is broader than mere formal equality and extends to substantive equality. In other words, it recognizes that facially neutral laws – those which treat all people the same – can be discriminatory in how they differentially affect a group of people.[177] The Coalition's statement of claim alleged that the City's encampment framework disproportionately impacted Indigenous peoples, women and gender minorities, people with disabilities, people who are not Christians, LGTBQ2+ people, and homeless people.[178] Further, it noted that these identities often intersect. The expert reports proffered by the

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172 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of AG, sworn 8 November 2023) at 341. Noting that on average 225 individuals were removed from ETS facilities at night between January 1 and February 28, 2023, see City of Edmonton, City Council, *Council Report CS01762: Edmonton's Approach (2023/24) Supporting Those Experiencing Homelessness* (1 May 2023) in Affidavit of Devyn Ens #1, *supra* note 100 at 31.

173 Reporting displacements every 24-48 hours see Affidavit of Devyn Ens #1, *supra* note 100 at para 9(f) citing *Staying Outside is Not a Preference, supra* note 147 at 30. The affiants described repeated experiences of displacement: Affidavit of AR, *supra* note 78 at para 2 (10 displacements); *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of JB, affirmed 13 July 2023) at para 2 (6 displacements in 1 year); Affidavit of LR, *supra* note 145 at para 2 (displacements every 1-2 weeks); Affidavit of LW, *supra* note 134 at para 3 (no more than 2 months without a displacement); Affidavit of RNSY, *supra* note 84 at para 5 (4 displacements in one month); Affidavit of TSc, *supra* note 79 at para 3 (countless displacements); Affidavit of TSe, *supra* note 78 (50 encampment displacements over 5 years). Discussing how each displacement makes survival more difficult, see *Staying Outside is Not a Preference, ibid* at ii; on the health impacts of displacements see *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Andrea Sereda, affirmed 5 September 2023) at para 16 ["Affidavit of Andrea Sereda"].

174 Affidavit of Damian Collins #1, *supra* note 24 at para 54.

175 Affidavit of PS, *supra* note 81 at para 5.

176 Transcript of RNSY, *supra* note 46 at page 24, lines 13-15.

177 *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at 174, cited with approval *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), [2020] 3 SCR 113, at paras 40-41 [*Fraser*].

178 *Tanudjaja, supra* note 64, has often been read for the proposition that homelessness is not an analogous ground under section 15, see *Waterloo, supra* note 88 at para 125; *Abbotsford, supra* note 74 at para 231. However, the Ontario Court of Appeal did not decide this point, *Tanudjaja, ibid* at para 37. The lower court's decision has been criticized as wrong, see Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69; Anna Lund,

Coalition in support of its injunction application spoke primarily to the disproportionate impacts on Indigenous peoples, women and gender minorities and people with disabilities.

This section will focus on the section 15 analysis as it applies to Indigenous peoples. That claim took on particular salience in the Edmonton litigation because of the significant overrepresentation of Indigenous peoples in the unsheltered population. Indigenous peoples are disproportionately represented in the unhoused population across Canada,[179] however, the degree of overrepresentation in Edmonton is of a different magnitude than in many of the municipalities where the encampment issue has been litigated. For example, in the *Shantz v Abbotsford,* the evidence before the Court was that 21% of homeless people self-identified as Aboriginal.[180] In *Regional Municipality of Waterloo v Persons Unknown,* the evidence was that 17% of homeless people self-identify as Indigenous.[181] In *Black v Toronto,* the court heard that 16% of the homeless population was Indigenous, but that number rose to 38% amongst those sheltering outdoors.[182] In the Edmonton litigation, the evidence showed that 55-57% of the homeless population is Indigenous,[183] and that number rises to at least 65% amongst the unsheltered homeless.[184] This compares to only 6% of the total Edmonton population that is Indigenous.[185] This overrepresentation was reflected in the Coalition's witnesses: 7 of the 10 affiants with lived experience self-identified as being Indigenous.[186] The only other encampment cases that are in the same class as Edmonton in terms of this degree of overrepresentation, and in fact exceed Edmonton, involve Prince George. In *Prince George v Stewart* the Court was presented with evidence that 79% of the homeless population was Aboriginal.[187]

The Supreme Court of Canada has articulated a two-part test to assess whether legislation or state conduct violates the equality guarantee in section 15. To establish a section 15 violation, an applicant must

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"Tenant Protections in Mobile Home Park Closures" (2021) 53:3 UBC Law Rev 759 at 797-801; and critiquing the broader tendency of courts to reject socio-economic status as an analogous ground see Kerri A Froc, "Immutability Hauntings: Socioeconomic Status and Women's Right to Just Conditions of Work under section 15 of the Charter" in Jackman & Porter, *supra* note 104; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds Under the Charter" (2013) 2:2 Cnd J Poverty L 1. Additionally, the Coalition's legal team was prepared to argue that the definition of homelessness (meaning people without homes) in the encampment context was narrower than the definition of homelessness in the *Tanudjaja* case (meaning precariously housed people).

179 *Upholding Dignity, supra* note 25 at 16 (35 percent of unhoused people versus 5 percent of overall population identify as Indigenous) citing Infrastructure Canada, *Everyone Counts, 2020-2022: Preliminary Highlights Report* (April 2023).

180 *Abbotsford, supra* note 74 at para 33.

181 *Waterloo, supra* note 88 at para 18.

182 *Black, supra* note 3 at para 61.

183 Affidavit of Damian Collins #1, *supra* note 24 at para 26.

184 Transcript of SMc, *supra* note 106 at 10, line 25 to 12, line 15. The number was reached using statistics from the by-names list for November 2023: Of 712 total unsheltered people, 441 self-identified as Indigenous and 32 did not answer the question about their ethnicity. 441/(712-32)= 64.9%.

185 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of Yale Belanger, affirmed 21 September 2023) at paras 35-36, 6.2% of the population in the census metropolitan area and 5.8% of the population in the City of Edmonton.

186 Affidavit of AR, *supra* note 78 at para 1; Affidavit of LR, *supra* note 145 at para 1; Affidavit of LW, *supra* note 134 at para 1; Affidavit of RNSY, *supra* note 84 at para 1; Affidavit of RFC, *supra* note 81 at para 1; Affidavit of TSc, *supra* note 79 at para 1; Affidavit of TSe, *supra* note 78 at para 1.

187 *Stewart*, *supra* note 67 at para 14; the overrepresentation of Indigenous peoples in northern cities is even higher, reaching 90%, in Whitehorse and Yellowknife, see Jesse A Thistle, *Indigenous Definition of Homelessness in Canada* (Toronto: Canadian Observatory on Homelessness Press, 2017) at 19.

show that "the impugned law or state action, (1) on its face or in its impact, creates a distinction based on an enumerated or analogous ground, and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage."[188]

Indigenous people are an "enumerated" group for the purposes of section 15.[189] The City argued that its encampment framework did not draw a distinction on the basis of Indigeneity, e.g., the City did not specifically target encampments with Indigenous peoples for displacements. However, "seemingly neutral" frameworks can still run afoul of section 15 when they have a "disproportionate impact" on a protected group.[190] Edmonton's encampment displacements adversely impacted Indigenous people *because* they are overrepresented in the unsheltered population.

Statistics can be useful for establishing that state action has an adverse impact of a protected group.[191] In the 2020 Supreme Court of Canada case of *Fraser v Canada,* the Court was asked to consider if a pension top-up policy violated section 15 of the *Charter* by discriminating against women. The policy allowed people who were suspended or on unpaid leave to top-up their pension, but denied this option to people who were working part-time as part of a job-sharing program. The evidence showed that the people in the job-sharing program were overwhelmingly women (reaching 100% between 2010-2014) and most had opted to job-share because of their competing responsibilities as parents.[192] The Court recognized that disproportionate impact can be established when "members of protected groups are denied benefits or forced to take on burdens more frequently than others."[193]

Indigenous people, comprising at least 65% of the unsheltered population in Edmonton, were forced to take on the burdens of displacement more frequently than others. Thus, the first step of the section 15 test was satisfied.

The burdens of displacement reinforce and exacerbate multiple disadvantages faced by Indigenous peoples, thereby satisfying the second step of the test under section 15. This dynamic can be traced through three different threads. First, colonial oppression has contributed to high rates of housing insecurity amongst Indigenous peoples *and* their overrepresentation in the unsheltered population. Second, the municipality's justification for encampment displacement draws on problematic stereotypes about Indigenous peoples as threatening. Third, Indigenous peoples experience the harms of displacement in particular ways because of how it undermines their relationships with other community members and their traditional lands.

Indigenous peoples in Canada experience multiple disadvantages flowing from historical and current government action and inaction. In the encampment case of *Prince George v Stewart,* the Court held that

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188 *Fraser, supra* note 177 at para 27.

189 *R v Sharma*, 2022 SCC 39 (CanLII), at paras 72, 118 [*Sharma*].

190 *Fraser, supra* note 177 at para 30. The mayor of Edmonton acknowledged as much – in a blog post released ahead of the meeting on calling a state of emergency, he wrote: "recent actions at encampment clearances may not be in line with our commitments to upholding reconciliation, and our obligation of care in communities across the city", Office of the Mayor Amarjeet Sohi, "Calling a Special Council Meeting to Declare a Housing and Houselessness Emergency" (11 January 2024), online (blog): *Medium* <medium.com/mayorsohi/calling-a-special-council-meeting-to-declare-a-housing-and-houselessness-emergency-c25c364bbeb0>.

191 *Sharma*, *supra* note 189 at para 49; *Fraser*, *supra* note 177 at para 67.

192 *Fraser, supra* note 177 at para 97. The Court noted that these statistics reflected a larger trend of Canadian women assuming primary responsibility for childcare and suffering workplace disadvantages as a result, *ibid* at paras 98-106.

193 *Fraser, supra* note 177 at para 55.

it must take "judicial notice of such matters as the history of colonialism, displacement, and residential schools"…, and "take account of context, including the context of the colonial enterprise and the injustice it has so often created…".[194]In the Edmonton litigation, University of Lethbridge Political Science professor Yale Belanger provided expert evidence highlighting the context of colonialism and how it contributed to housing precarity amongst Indigenous peoples. For example, inadequate government funding to First Nations has translated into inadequate, overcrowded on-reserve housing, which puts pressure on people to leave their reserve.[195] Indigenous people who choose to live in urban areas are not provided with adequate supports, in part because of intergovernmental fighting over who should be responsible for funding such programs.[196] These factors contribute to the high rates of Indigenous homelessness in urban centres like Edmonton.

When Indigenous peoples find themselves homeless, they face particular barriers to accessing shelters that are connected to their experiences of colonialism, including residential schools and foster care. In a survey commissioned by the City of Edmonton, two thirds of unhoused Indigenous people reported personal experience at residential school, day school or in the foster care system, and 100% had family or friends with experience in these systems. [197] In the Edmonton litigation, one unhoused affiant described growing up in foster care;[198] while another spoke about his personal experience of intergenerational trauma:

> My mom was forced by the government to go to day school near Lac La Biche. I grew up going to Catholic Church where I experienced abuse. Alcohol abuse runs in my family.[199]

Unhoused people who have been traumatized by these colonial institutions may "be cautious if not mistrustful of faith-based service."[200] Most emergency shelters in Edmonton "are provided by non-Indigenous, faith-based, non-profit organizations."[201]

Experience in colonial institutions may also make Indigenous people more mistrustful of the shared sleeping spaces provided in many emergency shelters.[202] In *Bamberger*, an unhoused individual from Muskowekwan First Nation in Saskatchewan powerfully described the connection between residential schools and a distrust of congregate care settings:

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194 *Stewart, supra* note 67 at paras 70-71, citing *R v Ipeelee*, 2012 SCC 113 at para. 60 and Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) at para 42, online (pdf): *Indigenous Legal Orders and the Common Law* <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>. And on taking judicial notice of colonialism, see *Sharma*, *supra* note 189 at para 55.

195 Affidavit of Yale Belanger, *supra* note 185 at paras 120-27.

196 *Ibid* at paras 107, 115, 154.

197 Affidavit of Devyn Ens #1, *supra* note 100 at Exhibit F; *Staying Outside is Not a Preference, supra* note 147 at 9.

198 Affidavit of AR, *supra* note 78 at para 1.

199 Affidavit of RFC, *supra* note 81 at para 2.

200 Affidavit of Yale Belanger, *supra* note 185 at para 46.

201 *Ibid* at para 46.

202 Affidavit of Andrea Sereda, *supra* note 173 at para 28(vi).

> He states that at one point someone spoke to him about moving into an auditorium and sleeping in a cot. However, he says that after facing decades of discrimination as an Indigenous person and having experienced residential school, he does not trust that he will be safe in that kind of environment.[203]

Indigenous people who find themselves unsheltered in Edmonton are subject to repeated, frequent displacement, and those displacements are often justified with reference to stereotypes about how Indigenous people are threatening.[204] The City's evidence, and the evidence provided by the police was used to suggest that there are dangerous people in encampments.[205] And yet, neither party ever explained how one could jump from that evidence to the conclusion that all people in encampments are dangerous, or that removing encampments was an appropriate way of responding to the threats posed by bad actors. In other housing contexts, police arrest and remove the bad actors.[206] Other municipalities, such as Kelowna, have set aside a dedicated area where unsheltered people can erect shelters, and have paid for security to ensure that bad actors cannot prey on the people in encampments.[207]

It is hard not to see stereotypical thinking at play in the framing by Edmonton of encampments as dangerous, especially given that most people sheltering in encampments were Indigenous. There is a long history in Canada of stereotyping Indigenous people as "savage and brutal."[208] The Supreme Court of Canada elaborated on this stereotype in *R v Williams* and specifically identified it as a barrier to equality:

> Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity…Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.[209]

State conduct which reinforces prejudicial stereotypes about a group can play a "critical role" in finding that the second steps of the section 15 analysis is satisfied.[210]

The harms flowing from displacements also impacted Indigenous people in distinctive ways. The loss of community that unsheltered people experience when there is a displacement can be devastating, but the loss of relationships is especially central to Indigenous experience of being homeless. When Métis

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203 *Bamberger, supra* note 67 at para 115.

204 *Sharma*, *supra* note 189 at para 53, evidence of stereotypical thinking can satisfy second step of section 15 test.

205 *Coalition for Justice and Human Rights*, Action No 2303 1557 (Affidavit of SMc, sworn 7 November 2023) at para 27; Affidavit of MD, *supra* note 42 at paras 27-29, 34. The threat posed by unhoused people was a common theme in the affidavits tendered by the City from people living in central neighbourhoods.

206 Kasari Govender, "Op-Ed: We need to talk about encampments" *Vancouver Sun* (14 September 2023), online <vancouversun.com/opinion/op-ed/kasari-govender-we-need-to-talk-about-encampments>.

207 City of Kelowna, "Outdoor Overnight Sheltering in Designated Sites" (22 April 2024), online: *City of Kelowna* <www.kelowna.ca/our-community/social-wellness/outdoor-overnight-sheltering>.

208 Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Ottawa: Library and Archives Canada, 2015) at 4.

209 *R v Williams,* 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 at para 58.

210 *R v Sharma, supra* note 189 at para 53.

academic Jesse Thistle developed a definition of Indigenous homelessness for the Canadian Observatory on Homelessness, he centred relationships in it. He observed that Indigenous homelessness was not just a lack of permanent stable shelter, but also isolation, a lack of important "relationships to land, water, place, family, kin, each other, animals, cultures, languages and identities."[211]

Homeless encampments are one way in which Indigenous peoples are rebuilding these relationships with one another. Belanger observed that "Indigenous individuals who consequently find themselves homeless in Edmonton, unite on the streets and renew kinship ties within their homelands… Indigenous people who establish encampments to enhance their survivability, are in effect creating their own neighbourhoods within their traditional lands."[212] Displacements undermine these relationships by forcing encampment residents to scatter.

Displacements also disrupt the relationships between Indigenous people and the land. Displacements were experienced in a specific way by some unsheltered Indigenous peoples because of how they connect to a broader history of dispossession. Belanger observed that "Being evicted from public spaces by way of institutions such as court injunctions or police services, reflects a history of the Canadian courts being utilized against Indigenous interests, thus reinforcing a legal/policy/social/ relationship that routinely denies Indigenous interests".[213]

The section 15 claim advanced in the Edmonton case responded to the stark reality of the situation in Edmonton. Indigenous peoples are overrepresented in the unsheltered population. The Coalition's evidence traced how this overrepresentation resulted from a confluence of historical and ongoing policies that lead to high levels of housing precarity and an aversion to shelter use amongst Indigenous peoples. The record indicated that displacements were being justified with respect to racist stereotypes that cast Indigenous peoples as threats and that the displacements caused distinct harms to Indigenous people by severing important relationships amongst them and between them and the land. One of the affiants captured the thrust of this argument dramatically, when he was displaced from an encampment where he had been living in a tipi. He chose to re-erect his tipi in front of Edmonton City Hall, as an act of protest and a reminder that the displacements continued a long history of removing Indigenous peoples from their traditional territories.[214]

## V. AN INVITATION TO FURTHER CONVERSATION AND ACTION (A CONCLUSION)

This article details how the Coalition would have advanced the *Charter* claims in its case, had it not been denied standing at an early stage in the proceedings. Legal counsel crafted these claims to reflect the benefits of encampments and harms of displacements identified by unsheltered Edmontonians. They were also informed by input from expert witnesses, as well as prior encampment case law and scholarship. As the litigants developed a more robust evidentiary record – through questioning and undertakings – the nature of the arguments evolved to reflect the specific accounts that emerged of what displacements were

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211 Thistle, *supra* note 187 at 6 cited in the Affidavit of Yale Belanger, *supra* note 185 at para 20-22.

212 Affidavit of Yale Belanger, *supra* note 185 at paras 157-58.

213 *Ibid* note 185 at para 192. Making a similar point about the destruction of Indigenous people's personal property, see Blomely et al, *supra* note 151 at 2

214 Transcript of RNSY, *supra* note 46 at page 24, line 7 to page 26, line 27.

like in Edmonton in 2023. It was a synthetic exercise that drew together the experiences and expertise of many.

The arguments outlined here may be used by litigants in other jurisdictions to develop their own claims. Undoubtedly, there is room to refine, to critique, and to improve them.[215] Others taking up these arguments will also need to tailor them to the specific legal and social context of their communities and what they are hearing from directly impacted people. For example, unhoused people repeatedly voiced their concerns over the loss of property during displacements and the Coalition's claim reflected these concerns. The local context also mattered to the Edmonton litigation. The hugely disproportionate number of unhoused people in Edmonton who are Indigenous informed the Coalition's arguments, as did the specifics of the Edmonton's encampment framework, and relevant provincial legislation. Yet, there are also similarities amongst the encampment displacement practices used in municipalities across Canada and useful lessons to be taken from the Edmonton litigation for claims brought elsewhere.

Developing a *Charter* analysis outside of the court may be especially important in the encampment litigation context because courts have been slow to take up the project. Most cases have been resolved at the injunction phase where the *Charter* analysis is limited to determining if there is a serious issue to be tried. And some, like the Edmonton litigation, do not even make it that far. And yet the *Charter* means little if it does not extend its protections to marginalized peoples facing serious peril as the result of state conduct. This article has aimed to articulate what those protections could look like, based on a legal analysis informed by the lived experiences of unsheltered people. And yet, at the same time, we cannot build shelters out of legal doctrine. This work of legal analysis must be matched with advocacy and organizing to ensure meaningful implementation of the *Charter'*s aspirations.

[215] I take Khaitan's point serious that scholars must be open to revisability, see Khaitan, *supra* note 16 at 553.